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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 666

CARL E. FREEMAN,

Petitioner,

vs.

THE SUSSIN CORPORATION, a Corporation, Alleged Bankrupt, and

RICHARD REX PARKIN, Receiver,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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The Scheffer Press, Inc.—ANdover 3-6850

INDEX

	PAGE
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes and rules involved	3
Statement	4
Proceedings below	4
Substance of the evidence	7
Reasons for the allowance of the writ	20
1. Petitioner deprived of his right of review	20
2. The Courts below countenanced fraud and perjury	24
3. The Court of Appeals extended the clearly erroneous rule to conclusions of law	30
4. The manifest error below	34
Conclusion	36
Appendix A—Opinions below	1a
B—Statutes and rules	6a

CITATIONS.

Cases:

Bertlee Company v. Illinois Publishing & Printing Co., 320 Ill. App. 490, 511; 52 N.E. 2d 47, 56	32
Bogardus v. Commissioner, 302 U. S. 34, 39	34
Borrowdale v. Sugarman, 347 Ill. App. 390, 107 N.E. 2d 45, (4 Ill. App. 2d 164)	28
D.M.W. Contracting Co. v. Stolz, 158 F. 2d 405, 407	22, 34
Gray v. Rollo, 85 U. S. 629, 633-4	35
Hausman Steel Co. v. Severin Co., 316 Ill. App. 585, 45 N.E. 2d 522, 554	31

PAGE

Higby v. Rust, 112 Ill. App. 218, 222 32
Maynard v. Elliott, 283 U. S. 273, 278 35
Obartuch v. Security Mutual Life Ins. Co., 7 Cir., 114 F. 2d 873, 878 31
Quock Ting v. U. S., 140 U. S. 417 29
Sapero v. State Board of Medical Examiners, 90 Colo. 568, 577, 11 P. 2d 555, 558 22
Tulluride Power Co. v. Crane Co., 208 Ill. 218, 226, 70 N.E. 319, 322 33
United States v. Oregon State Medical Society, 343 U. S. 326, 339 22
United States v. U. S. Gypsum Co., 333 U. S. 364, 396 ..... 22, 34

Statutes and Rules:

11 U.S.C., 47(a), 52 Stat. 854 [Sec. 24(a), Bankruptcy Act] 2, 3, 23, 6a
11 U.S.C., 95(b), 66 Stat. 425 [Sec. 59(b), Bankruptcy Act] 3, 35, 6a
28 U.S.C., 46, 62 Stat. 871 ..... 3, 23, 6a
28 U.S.C., 2101(c) 2
28 U.S.C., 125(1) 2
Ill. Rev. Stat., ch. 106½, sec. 15 ..... 3, 34, 7a
Order 47, General Orders in Bankruptcy [11 U.S.C., Order 47, fol. sec 53] 2, 3, 34, 4a, 7a
Rule 52(a), Rules of Civil Procedure for District Courts [28 U.S.C., sec. 2072, Rule 52(a) 2, 3, 34, 8a

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Carl E. Freeman, the petitioning creditor-appellant in the court below, respectfully prays that a writ of certiorari be issued to review the judgment of the United State Court of Appeals for the Seventh Circuit entered in this cause on November 8, 1955.

CITATIONS TO OPINIONS BELOW.

The opinions of the Court of Appeals, printed in Appendix A hereto, *infra,* pp. 1a-5a, are reported in 227 F. 2d 121.[1]

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[1] The Referee's certificates on review of his orders here involved, which orders were confirmed by the District Judge (R. 1568), are contained in the Record as printed for use of the Court below (and on file here) at pages: R. 1488-1493; R. 1508-1531; R. 1531-1538; R. 1538-1545.

JURISDICTION.

The judgment of the Court of Appeals was entered November 8, 1955, and a rehearing denied by said Court on December 9, 1955. Copies of the judgment and the order denying rehearing are contained in the certified record of the proceedings in the Court of Appeals, on file with this Court.

This petition is filed within the ninety days provided by law. 28 U.S.C., Section 2101(c). The jurisdiction of this Court is invoked under 11 U.S.C., Chapter 4, Section 47(c), and 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED.

1. Whether or not the refusal to review the record by one of the Judges of the Court of Appeals considering the case, despite petitioner's contention that the findings of the Referee, concurred in by the District Judge, were clearly erroneous, deprived petitioner (appellant below) of his statutory right of review and was such a grave departure from the usual, ordinary and required course of judicial proceedings as to call for the exercise of this Court's power of supervision.

2. Whether or not the courts below, in countenancing the manifest fraud, self-impeaching testimony and perjury of the respondent corporation's president and *alter ego,* apparent to all who will trouble to read the record, have so grossly misapplied the "clearly erroneous" rule of Bankruptcy General Order 47 (identical with that of Federal Rule 52(a)) that their action constitutes a departure from the usual course of judicial proceedings calling for the exercise of this Court's power of supervision.

3. Whether or not the Court of Appeals, in declining to disturb the Referee's findings, confirmed by the District

Court, on the ground of the "clearly erroneous" rule, thus applying that rule to conclusions of law as well as findings of fact, did not construe this rule in a manner which is inconsistent with the applicable decisions of this Court. (The purely legal issues to which the Court extended the clearly erroneous rule were: (i) whether or not the contract found by the District Court to have been made by petitioner and the respondent corporation for the purchase of cameras had any legal force or effect; (ii) the validity of the Referee's order awarding certain property to reclamation petitioners, the "Borrowdale Brothers," without the introduction of any evidence whatsoever; and (iii) whether or not the Referee's dismissal from the suit of the intervening petitioning creditors without costs was an abuse of his discretion.)

4. Whether or not the judgment below on the merits is contrary to the law and evidence in (i) finding that a contract for the purchase of cameras existed between petitioner and the respondent corporation, and, that the sums advanced by petitioner to it or for its benefit were payments on the contract, (ii) finding that petitioner was not an eligible petitioning creditor, and (iii) awarding the Maston promissory notes to the receiver.

STATUTES AND RULES INVOLVED.

The statutory provisions involved are Section 46 of the Judicial Code (28 U.S.C., 46), Sections 24(a) and 59(b) of the Bankruptcy Act (11 U.S.C., 47(a) and 95(b)) and Section 15 of the Illinois Uniform Partnership Act (ch. 106½, sec. 15, Ill. Rev. Stat. 1955). The rules of court involved are General Order in Bankruptcy 47 and Rule 52(a) of the Rules of Civil Procedure for District Courts. All are printed in Appendix B, *infra*, pp. 6a-8a.

STATEMENT OF THE CASE.

The Proceedings Below.

The petitioner, Carl E. Freeman, on February 20, 1953, filed in the District Court his single creditor petition for the adjudication of the respondent, Sussin Corporation, as a bankrupt, the jurisdiction of the Court being invoked under the Bankruptcy Act. (R. 8) Freeman's original petition and amended petitions, thereafter filed, asserted claims of $11,000 for money loaned the Sussin Corporation and $2,680 for services rendered to it. The claim for services was abandoned in the Court of Appeals. The petitions charged the alleged bankrupt with preferring creditors while insolvent and the concealment and fraudulent transfers of assets, alleged the existence of unsatisfied judgments against it and prayed for the appointment of a receiver and for its adjudication.

The answers of the Sussin Corporation denied its insolvency, denied the existence of any indebtedness to Freeman, denied that there were any judgments against it, and asserted defensive counterclaims against him aggregating in excess of $17,000. (R. 11-14) The holders of five judgments against the Sussin Corporation, totaling over $6,000, subsequently intervened as petitioning creditors. (R. 19, 33, 41)

On March 20, 1953, on the application of Freeman and the intervenors (with one exception), the District Judge appointed the respondent, Richard Rex Parkin, as Receiver of the Sussin Corporation. The Court in making this appointment based it on the existence of the judgments, and not on the controverted allegations of Freeman's petitions. (R. 29-30) Freeman, however, put up the petitioning creditor's bond, originally fixed at $5000 and later raised by the Referee to $25,000. (R. 32, 1257)

During the course of hearings before the Referee on the issue of the insolvency of the Sussin Corporation, the receiver (on July 21, 1953) filed a show-cause petition for a rule on Freeman to compel him to turn over certain promissory notes and cash (property of a total value, including the cash, of about $3,500) which the receiver contended Freeman had wrongfully appropriated from the Sussin Corporation. (R. 62) After issue was joined on the receiver's petition the Referee interrupted the hearings on the adjudication of the Sussin Corporation to try the collateral issue raised by the receiver. The trial of this issue proceeded through numerous hearings and several thousand pages of stenographic record during which evidence was adduced concerning all the financial transactions which had occurred between Freeman and Russell Borrowdale, the president and *alter ego* of the Sussin Corporation. (R. 270)

On May 3, 1954, the Referee entered an order granting the prayer of the receiver's petition and directing Freeman to turn over to the receiver eleven promissory notes (called the Marston notes) and the sum of $887.99. (R. 1413)

On May 4, 1954, the Referee entered an order on the motion of the Sussin Corporation dismissing Freeman's petitions for its adjudication, finding that it never was indebted to him in any sum whatsoever, that his petitions were not filed in good faith, and reserving jurisdiction to assess damages against him. (R. 1421)

On May 21, 1954, the Referee entered an order over Freeman's objections on a petition filed that day by the "Borrowdale Brothers," a partnership consisting of the sons of the president of the Sussin Corporation, directing the receiver to turn over to the partnership certain trucks and

property claimed by it, which order was entered without permitting Freeman to file a responsive pleading and without the introduction of any evidence to sustain it.[1] (R. 1474-5, 1492)

On June 21, 1954, the Referee entered an order on the motions of the intervening petitioning creditors (the judgment creditors) dismissing them from the proceeding without costs. (R. 1502) This order, eliminating the intervenors from the suit, was brought about through arrangements whereby Sussin Corporation paid them (but not to any other creditors) fifty per cent of their claims in satisfaction thereof and gave them covenants not to sue on possible causes of action arising out of the discontinuance of the bankruptcy suit. (R. 1434-6)

The four orders above-described were reviewed before the District Judge and confirmed on September 24, 1954. (R. 1568) Freeman appealed from this order. (R. 1578)

On October 8, 1954, the receiver was ordered to return to the Sussin Corporation its property in his possession and to make his final report, which things were done. (R. 1580)

The orders of the Referee as so confirmed effectively disposed of the litigation except for Freeman's appeal, the

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[1] The Borrowdale Brothers had filed a similar reclamation petition approximately a year earlier upon which issue was joined by the receiver and Freeman. After hearings and the submission of briefs the matter was taken under advisement by the Referee to whom the cause was originally referred. His term of office expired before a decision was rendered on the issue of title. The Referee to whom the case was thereafter referred adjourned the reclamation petition from time to time, heard no evidence on it, and did not consider the record made before the first Referee in passing the order of May 21, 1954. (R. 1492)

enforcement of the turn-over order and the proceedings to assess damages against him. The Court of Appeals granted supersedeas as to the Referee's orders of May 3 and May 4, 1954. The hearings on the issue of the insolvency of the Sussin Corporation never were concluded. It has not been adjudicated a bankrupt in this proceeding nor has it been found a solvent concern.

The Substance of the Evidence

A major issue in the case with reference to the Referee's order of May 4, 1954, finding the Sussin Corporation not indebted to Freeman in any amount, is whether the substantial sums of money received by it from Freeman were loans to it, as he contended, or were advance payments on the purchase of cameras, as the Sussin Corporation contended. Also, of importance in this regard is whether or not, if there was an agreement for the purchase of cameras, it had any legal efficacy because of a complete lack of definitiveness as to every essential element.

The respondent Sussin Corporation, located in Chicago, Illinois, was engaged in the business of manufacturing large commercial cameras used in the printing industry. Freeman had been in the photo engraving and lithographing business for some 20 years before his retirement in 1951. (R. 528)

In March of 1952, Freeman, who had been out of the United States for a considerable period, paid a visit to Borrowdale at the Sussin plant to see his (Freeman's) 31-inch Consolidated camera which had been stored there since August, 1950. (R. 403, 405-6) Freeman testified that in his conversation with Borrowdale the latter told him about his financial difficulties, particularly that he

had sold a camera to one John Orr, of New York, but did not have the money to complete its manufacture. (R. 407) Borrowdale said he needed $1,000 for parts and for labor and requested Freeman to advance it to him. (R. 407) Freeman agreed and at Borrowdale's suggestion they exchanged checks dated April 2, 1952. (R. 407) Borrowdale's check to Freeman was drawn on the "E. R. Renner" account. (Freeman's Ex. 9, Ex. Vol. p. 43; R. 507-8) This bank account was the only one Borrowdale and the Sussin Corporation had and E. R. Renner was the name of Borrowdale's deceased father-in-law. (R. 263, 270) Freeman testified he was to hold this check for 30 days or so, until Borrowdale delivered the Orr camera and collected on it, when Freeman was to be paid. (R. 407) Freeman gave Borrowdale his check for $1,000 which was cashed by Borrowdale immediately. (Freeman's Ex. 29, Ex. Vol. p. 60; R. 507-8)

Borrowdale testified the $1,000 loaned by Freeman was to buy a car (R. 361) but Freeman denied that anything was said about the purchase of a car. Freeman testified that at that particular time Borrowdale already owned a new Nash car. (R. 545) The Renner-Borrowdale check given to Freeman was never paid. Freeman testified that after the relations between him and Borrowdale became strained in December, 1952, Borrowdale took the check from him by force. (R. 550-1, 612, 629, 631) Borrowdale denied this. (R. 272) But Albert Froling, an employee of the Sussin Corporation at the time and a witness for it, in substance corroborated Freeman (R. 1194-5)

After the exchange of checks in April, 1952, Borrowdale, according to Freeman's testimony, suggested that Freeman take over the sales of the Sussin Corporation cameras. (R. 407-8) Borrowdale said he was making one camera at a

time, that it was expensive, and that if he could make six cameras simultaneously the operation would be cheaper. (R. 408) Borrowdale said, according to Freeman, that for the corporation to get into production it would need about $1,000 for each camera, or a total of $6,000. (R. 451)

Freeman testified that it was Borrowdale's suggestion that he (Freeman) loan the necessary funds which were to be in addition to the $1,000 loaned through the check transaction (R. 452), that Freeman take over the selling, and that the Sussin Corporation would pay Freeman a 40% commission on sales, including this commission on the cameras Borrowdale had on order, the one for Mr. Orr and another one for the Precision Color Plate Company. (R. 452, 647) The commission was to be paid to Freeman for advancing the money, his sales efforts, and for the services he was to perform in the shop. (R. 452) Freeman testified that Borrowdale's offer of a commission on the cameras ordered by Orr and Precision was an inducement to enter into the arrangement. (R. 745, 747-8) Borrowdale, according to Freeman, was to devote his time to the manufacturing end of the business and Freeman to selling cameras, running the office and handling the finances. (R. 418-9, 452, 1232-3)

Freeman testified that he agreed to these plans and to advance the money. (R. 408) A desk was placed next to Borrowdale's at the Sussin shop for Freeman and the arrangements so discussed were placed in immediate execution as the corporation needed Freeman's money to obtain parts and castings for cameras. (R. 410)

The Diamond Foundry Company, of Waukesha, Wisconsin, a creditor of the Sussin Corporation, had possession of its patterns and refused to produce any castings

until its bill of $6,135.35 for castings previously furnished through the years was paid. (R. 413, 684) Freeman and Borrowdale went to Waukesha to talk to the officers of the Diamond Company regarding a settlement of the claim. (R. 1049) Shortly after, an agreement prepared by the attorney for the Foundry Company was executed which obligated Freeman to settle the $6,135.35 obligation for $3,067.50 and to make an advancement of $1,000 on six sets of castings. (Freeman's Ex. 10, Ex. Vol. 44; R. 507-8) Freeman paid these amounts by checks to Borrowdale which were endorsed to the Foundry Company. (R. 835, 1036) At or about this time Freeman opened a sole proprietorship checking account at The Northern Trust Company bank, Chicago, under the name of the "Sussin *Sales* Company." He testified he used this name to connect his efforts with the camera business, particularly to the Sussin Corporation. (R. 535, 536, 708)

Commencing May 14, 1952, Freeman advanced to or for the benefit of the Sussin Corporation the sum of $3,386.59 in addition to the $4,067.50 paid to the Diamond Foundry Company. These moneys were paid to settle four judgments against the Sussin Corporation, including a State court equity proceeding for the appointment of a receiver for the Sussin Corporation (Freeman's Ex. 37, Ex. Vol. p. 68; R. 508), to pay for castings, tubing, lenses, vacuum pumps and timers for cameras, and to pay some miscellaneous bills. With the exception of an insignificant amount these moneys were all disbursed by Freeman prior to July 1, 1952. It was stipulated by the parties that all the checks which Freeman gave to Borrowdale, the Sussin Corporation or other concerns, as Freeman claimed, on behalf of the Sussin Corporation, totalled $10,968.09. (R. 768) This total included $2,514 which Freeman testified constituted the cash consideration he paid for the Marston notes. (R. 771)

Freeman testified that Borrowdale came to him in May, 1952, with papers his (Borrowdale's) attorney, Pabst, had prepared to incorporate the Sussin *Sales* Company, that he (Freeman) declined to sign the papers, and that later Borrowdale requested him to form a partnership to sell cameras, which Freeman also refused, saying he wanted the arrangement to continue as originally agreed. (R. 532)

Borrowdale testified that Freeman came to see him in the spring of 1952 and suggested they go into business together, that Freeman said he would furnish the money and that Borrowdale could oversee the operation. (R. 222-3)

Borrowdale testified that the Sussin *Sales* Company was a corporation to be formed by them but that it was never actually incorporated, that Freeman was to put up the capital of $20,000 which was to be turned over to the respondent, Sussin Corporation, to purchase cameras from it, that the stock was to be divided equally between them, that Borrowdale's contribution was to be the "know-how," that all Freeman had was money and no knowledge, that he (Borrowdale) had the knowledge, and that the purpose of the corporation was to sell cameras. (R. 219-20)

Borrowdale said that he and Freeman acted as a partnership, then he said they decided to go into a corporation and finally back to a partnership "but the order stayed just the same for the six basic cameras." (R. 286)

It was April, May or June (1952) when Borrowdale said he found out that Freeman would not go ahead with the corporation. (R. 285) Earlier Borrowdale had testified it was the last part of the year 1952. (R. 225-6)

Borrowdale testified that the six cameras were ordered in May or June 1952. (R. 228) He identified a carbon copy

of a letter dated June 14, 1952, which he said he dictated as a record of the acceptance of the order on behalf of the Sussin Corporation. He said he handed the original to Freeman. (R. 231) Freeman denied this. (R. 556) The carbon was introduced in evidence by counsel for Freeman as his Exhibit 6. (Ex. Vol. p. 40; R. 507-8) This letter from the Sussin Corporation is addressed to the Sussin *Sales* Company and purports to acknowledge an order "from Carl Freeman and Russell Borrowdale partners in the Sussin Sales Company," for six cameras at a minimum amount of $20,000, the balance, *if any*, depending on attachments ordered when the cameras are ready for delivery.

Borrowdale conceded that on June 14, 1952, the date of the letter, he was in Athens, Georgia, having left Chicago about June 7, 1952. (R. 236, 238) He said he dictated the letter to Mrs. Borrowdale before he left Chicago. (R. 241, 275) Mrs. Borrowdale, however, had testified that she could not take shorthand or dictation. (R. 188-9)

Borrowdale was referred to the fact that as a partner in the Sussin *Sales* Company he owed one-half of the $20,000 on the purchase of the cameras. He said he "thought he did." (R. 290)

Later in his testimony Borrowdale identified some handwritten notes on the reverse side of the last page of Sussin Corporation's Exhibit 16. (Ex. Vol. p. 116; R. 1013) He testified these notes were made by him on April 1, 1952, when he and Freeman were alone and discussing the Sussin *Sales* Company or Corporation. He said Freeman orally approved the notes as being the basis of their understanding and that he (Borrowdale) took the notes to his lawyer (Pabst) to have a contract prepared incorporating the "points" contained in the notes. (R. 1010-11, 1016) The notes purport to show that Borrowdale and

Freeman, as partners or as a corporation, ordered six basic cameras from the Sussin Corporation, that $20,000 was to be advanced on the purchase price and the *balance* paid on delivery in five months. The contract, however, which Attorney Pabst prepared did not square with Borrowdale's testimony. It did not obligate the vendee, Sussin *Sales* Company, to purchase six cameras or any cameras, nor did it provide for a $20,000 advance payment. (Sussin Ex. 11, Ex. Vol. p. 108; R. 611) Also, the articles of incorporation for the Sussin *Sales* Company, prepared by Borrowdale's attorney at his request, provided that only ten shares of stock were to be issued for a total consideration of $1000 (Article Six), and that the estimated value of the property to be owned by the company during its first year was $5000 (Article Nine). (Borrowdale Ex. 9, Ex. Vol. p. 126; R. 611)

The Sussin Corporation's counterclaim states that Freeman agreed to pay a minimum price of $4,000 per camera, *i.e.* $24,000 for six. (R. 12) Borrowdale's letter of June 14, 1952, stated the minimum price for the six cameras ordered by the partnership was $20,000. The Sussin Corporation's published price list effective August 1, 1952, showed the basic camera at $3,485, a total of $20,910 for six. (Freeman's Ex. 57, Ex. Vol. p. 86; R. 1115) The earlier price list of August 1, 1950, disclosed the price for a basic camera was $2,785, or $16,710 for six. (Sussin Ex. 16, Ex. Vol. p. 113; R. 1013)

Borrowdale stated the cost of the cameras would depend on the accessories ordered, that one camera *could* cost $20,000. (R. 1108) He evaded a direct question as to whether $3,485 was the purchase price of the cameras, saying the six cameras could cost "x-times twenty thousand dollars." (R. 1109)

Borrowdale, early in the hearings, testified that the cameras ordered were basic cameras—six basic cameras. (R. 293) At the hearing on December 17, 1953, considerably later, Borrowdale stated for the first time that accessories were ordered in addition to the basic cameras, namely, a vacuum back and a screen raising mechanism. (R. 1108) He then testified he would not sell a basic camera without attachments because "they wouldn't work," that the basic cameras would not work without attachments. (R. 1124) He finally conceded in his testimony that the order for cameras was not a "full order." (R. 1125)

Borrowdale denied that Freeman was to be paid any commission by the Sussin Corporation. (R. 297) Later he testified that after a thorough discussion of the matter with Freeman it was arranged that *they* would take a twenty per cent commission. (R. 1123) He added that the understanding was that if Freeman paid $50,000 to the Sussin Corporation *he* would get an exclusive and a forty per cent commission. (R. 1125)

The witnesses for the Sussin Corporation, including the brother and son of Russell Borrowdale, all of whom had an interest in the case, with the possible exception of Albert Froling, its employee for six years, were unable to give any definitive testimony with regard to the alleged contract. Their testimony was to the effect that in conversations with Borrowdale and Freeman, Borrowdale said they were organizing a sales corporation and buying six cameras, or, that Freeman said, or Borrowdale said in Freeman's presence, that he, Freeman, was buying six cameras and putting up $20,000. (R. 917, 952, 1035, 1060, 1171-2) On the other hand Mrs. Edna Borrowdale (the wife of Russell Borrowdale), who worked at the Sussin

plant and testified as a witness for the receiver, gave support to Freeman when she said that he was at the plant to learn about cameras and sell them. (R. 196, 198-9) She did not mention any agreement on Freeman's part to buy cameras although she had ample opportunity. Mr. Orr, the receiver's witness, testified that Borrowdale told him that he (Borrowdale) "might work out something on the sales (of cameras) with Freeman." (R. 113) This testimony referred to a conversation on June 10, 1952, and was never denied by Borrowdale.

No cameras were ever manufactured under the alleged order (R. 1211), nor did the respondent Sussin Corporation ever produce a written order from Freeman to evidence a contract for the purchase of cameras. Russell Borrowdale, Jr., testified that his father kept asking Freeman to sign a contract from March right up to December 1952. (R. 980-1) This was the agreement (never signed) prepared by Attorney Pabst wherein the Sussin *Sales* Company, a corporation, was the vendee. (R. 226) (Sussin Ex. 11, Ex. Vol. p. 108; R. 611)

On this evidence the Referee found (i) that *Freeman* as the Sussin *Sales* Company agreed some time in April, May or June, 1952, to purchase six cameras from the Sussin Corporation and to pay as a *down payment* the sum of $20,000 (R. 1528), (ii) that the agreement was evidenced by a writing, namely, the agreement with the Diamond Foundry Company (R. 1528; Freeman's Ex. 10, Ex. Vol. p. 44; R. 507-8), and (iii) that the moneys Freeman paid to and for the Sussin Corporation and to Borrowdale were payments on the purchase of the cameras. (R. 1537)

The Marston Notes

The issue between the receiver, Parkin, and Freeman as to the ownership of the Marston notes stemmed from

the sale of the camera by the Sussin Corporation to John Orr, of New York. He owned three companies: the Orco Cameras, Inc., the Garraway Company, Inc., and the M. L. Marston Co., Inc. (R. 67, 88)

The purchase price of the camera was $10,683 and it was invoiced to the Orco company. (R. 255; Freeman's Ex. 7, Ex. Vol. p. 41; R. 507-8) Freeman testified he accompanied Borrowdale on the delivery of the camera to be available to handle whatever financing was required. (R. 453-4) Orr had indicated he would have to finance a part of the purchase price and Borrowdale, or the Sussin Corporation, was not in a position to carry the financing. (R. 94, 120)

The papers for the financing of the deferred balance of the purchase price were not made up at the time of the delivery of the camera. (R. 456) After Borrowdale and Freeman returned to Chicago, promissory notes, due monthly, and a conditional sales contract were prepared by Freeman for the signature of the *Orco* company. (R. 465) Freeman testified that Borrowdale, on behalf of the Sussin Corporation, assigned the conditional sales contract to him by endorsement across its face and thereafter the papers were sent to Orr for signature. (R. 473)

Freeman testified the consideration he gave for the Orco notes was $2,514 in checks he issued to and for the Sussin Corporation and the remainder his commission promised by Borrowdale. (Freeman's Ex. 49, Ex. Vol. p. 82; R. 493) Orr changed the transaction to take the title to the camera in his *Marston* Company and did not use the Orco papers sent by Freeman. (Freeman's Ex. 1, p. 32; R. 506-7) Borrowdale denied the making of the Orco notes (R. 305-6) but on cross-examination the receiver's witness, Orr, admitted their receipt and that they had been lost or misplaced. (R. 129-130, 133)

Anthony, Orr's assistant treasurer and bookkeeper, by letter addressed to the Sussin Corporation dated July 10, 1952, sent eleven notes made by the Marston Company and a check in lieu of the first note which was then due. (Freeman's Ex. 2, Ex. Vol. p. 34; R. 506-7) Freeman testified he received these papers at his home in a self-addressed envelope which he had prepared and enclosed, with Borrowdale's authority, in the letter transmitting the original Orco notes to New York. (R. 473-4) Anthony's letter of July 10, 1952, was mailed on July 11, 1952, Orr so testifying. (R. 109) This is substantiated by the fact that Anthony, under date of July 11, 1952, marked the note paid which represented the first monthly installment then due and for which a check had been sent in lieu thereof. (Receiver's Ex. 17, Ex. Vol. p. 18; R. 99) Orr testified that the postoffice through which the company's mail was sent was the Church Street Station, New York. (R. 109, 149)

Freeman introduced in evidence the envelope in which he stated the notes were received by him. The envelope bears the postmark "July 11, 1952, Church Street Station, New York" and shows that additional postage was required and affixed at the destination, proving contents in excess of ordinary mailing weight. (Freeman's Ex. 4, Ex. Vol. p. 37; R. 506-7)

Anthony's letter of July 10, 1952, stated that a conditional sales contract was enclosed with the notes and check. Freeman testified that the contract was not enclosed. (R. 428-9) Freeman's testimony on this was proven by documentary exhibits introduced by the receiver, namely, a letter from Anthony dated August 8, 1952, stating that their attorney had the conditional sales contract which would be signed and mailed, and his letter of September

30, 1952, saying that their records showed the contract had been mailed. (Receiver's Exs. 27, 26, Ex. Vol. pp. 26 and 25; R. 114, 107)

Borrowdale testified, on the other hand, that he received the notes and conditional sales contract at the same time. (R. 203) When, however, the Marston check which was sent with the notes was shown to him he testified that he had never seen it. (R. 205) He testified that upon receipt of the notes and contract he put the notes in one drawer of his desk and the contract in another drawer, where he kept his legal papers. (R. 202) He said the notes subsequently disappeared. (R. 211) Borrowdale, to establish a basis for Freeman's alleged culpability in connection with the disappearance of the notes (as well as Freeman's possession of the Marston checks for July and September, 1952), testified he "noticed" Freeman was getting the Sussin mail at the Vihon Company, where it was delivered daily (R. 206), and Borrowdale, Jr., testified that, while his father told him the notes were in his desk drawer, he actually saw them there, and moreover saw Freeman going through their mail and through his father's and mother's desks. (R. 989, 951)

Freeman cashed the Marston checks for the July and September, 1952, payments after their endorsement and delivery by Borrowdale who, Freeman testified, put a "The Sussin Co." stamp on the checks. (R. 502-3) Freeman said that at the request of the bank teller, when cashing the checks, he added in his own hand to the abbreviation "Co." the letters "rp" to make the word "Corp." (R. 503) It was conceded by counsel for the Sussin Corporation that if Freeman owned the Marston notes he had the right to deposit the checks in his own account. (R. 1297-8)

Borrowdale received from Marston a check in the amount of $444.40 in payment of the note due in August, 1952, and cashed it. (Receiver's Ex. 3, Ex. Vol. p. 4; R. 71) A few days later he bought a cashier's check in precisely the same amount as the Marston check, even to the pennies, and gave it to Freeman. (Freeman's Ex. 8, Ex. Vol. p. 42; R. 504-5) Freeman testified that when Borrowdale gave him the cashier's check he stated that it was for the second Orco (Marston) note. (R. 551) Borrowdale admitted giving Freeman the cashier's check (R. 265) but evaded direct questions as to why he turned over this money to Freeman. (R. 266-7, 272-3)

Borrowdale first testified he offered the cashier's check on account of a $1000 personal obligation he owed Freeman. Borrowdale testified, however, that Freeman declined to accept it on the $1000 debt telling Borrowdale not to "mind" the $1000, to apply it (the $1000) on Freeman's obligation to Sussin Corporation on the camera. (R. 266) Again when asked about the cashier's check Borrowdale said "The four hundred forty dollars. There is a question about fifteen hundred dollars more. There is fifteen hundred dollars more. I cannot figure out how he did it." (R. 267) Borrowdale did not over-come the inference that he gave Freeman the Marston payment in the form of the cashier's check for the reason that Freeman, as the owner of the notes, was entitled to it.

When Freeman received the August and September, 1952, payments he cancelled and returned to the Marston Company its notes maturing in those months. (Receiver's Exs. 18, 19, Ex. Vol. p. 18; R. 99) This reduced the number of notes in his possession, originally eleven, to nine. The two notes cancelled and returned to the Marston Company were produced by Orr on the witness stand. (R. 99) Freeman

testified he discussed with Borrowdale in July, 1952, the matter of the Sussin Corporation endorsing over to him the Marston notes which were payable to it and that Borrowdale said to leave well enough alone since the notes were being paid and Orr was antagonistic towards him. (R. 670) Borrowdale conceded in his testimony that Orr disliked Freeman. (R. 1000)

Borrowdale received and cashed the Marston checks for October, November and December, 1952, retaining the proceeds. (Receiver's Exs. 5, 6, 7, Ex. Vol. pp. 6-8; R. 71) Borrowdale testified he discovered the loss of the Marston notes in September, 1952. (R. 206) He did nothing about this loss until January 19, 1953, when, after having the argument with Freeman in December, he wired Orr to ignore Freeman's claim to the notes. (Receiver's Ex. 10, Ex. Vol. p. 11; R. 74) Borrowdale, in his testimony relating conversations had with Freeman at the time of the Orr-Marston transaction (June-July, 1952), three times conceded Freeman an interest of $1,500 in the Marston notes by admitting that he (Borrowdale) had agreed to repay Freeman that amount which he said Freeman was claiming he had in the notes. (R. 1143, 999, 1000)

The Referee found that Freeman did not have and never had any right, title or interest in the Marston notes. (R. 1414)

REASONS FOR THE ALLOWANCE OF THE WRIT.

1. *Petitioner Was Deprived of His Right of Review in the Court of Appeals.*

The division of the Court of Appeals that considered this case consisted of Circuit Judges Finnegan, Duffy and Swaim. Judge Finnegan wrote the opinion announcing the Court's judgment, although neither of the other judges joined in his opinion.

In his opinion, which he had obviously written pursuant to an assignment to write the opinion of the Court, he made it clear that he had not troubled to read the "prolix" record, despite the fact that one of petitioner's principal contentions was that the findings of fact of the Referee, confirmed by the District Court, were clearly erroneous. Judge Finnegan appeared to be incensed that he should be asked to read a 1616 page record. He said:

> "Freeman, in substance, would have us re-weigh the evidence shown in this 1616 page record and evaluate the credibility of witnesses who appeared before the Referee. We decline to do so. For that reason it is unnecessary to perform an autopsy on the evidence and then state our version of what is traced in the record. Freeman, in our opinion based upon careful examination of his briefs, has, simply raised tenuous points in his appeal."

It is thus evident that Judge Finnegan did not review the record and did not consider it his duty to do so. Any inference to the contrary that might be drawn from the second sentence of his opinion, stating that the prolix record is devoid of any legal basis for a departure from prior decisions expressing reluctance to annul Referees' findings[1], is clearly dispelled by the language just quoted and his opinion as a whole.

In keeping with his concept of his duty in the premises, Judge Finnegan made no mention of any evidentiary facts. Instead he relied exclusively upon the "comprehensive certificates" made by the Referee. His laudatory reference to the Referee's certificates was coupled with the language quoted above, in which he expressly refused to perform

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[1] An expression he also used, in substance, in his opinion in the case of **In re Garden City Brewery**, 7 Cir., 208 F. 2d 377, 379, cited in his opinion in the case at bar.

an "autopsy" on the record, which expression, in any sense, literal or figurative, denotes an avowed purpose not to "look" at the record.

When the error assigned on appeal is that the findings of fact of the trial court are clearly erroneous (R. 1581-2), the reviewing court must examine the entire record. This is the purpose of having the record before it, as this Court has recognized in the classes of cases in which Congress has given this Court the duty of reviewing the record. *United States* v. *Gypsum Co.*, 333 U.S. 364, 395; *United States* v. *Oregon State Medical Society*, 343 U.S. 326, 339.

The Court of Appeals for the District of Columbia in *D.M.W. Contracting Co.* v. *Stolz*, 158 F. 2d 405 (cert. den. 330 U.S. 839) has held that a district judge, in passing upon the contention that findings of fact are clearly erroneous, is required to review the transcript of the proceedings, evidence and exhibits to determine for himself whether the findings should be sustained. The same principle obviously applies to an appellate court. As the Supreme Court of Colorado said in *Sapero* v. *State Board of Medical Examiners*, 90 Colo. 568, 577, 11 P. 2d 555, 558:

> "An examination of the record with slavish adherence to the findings and without fidelity to the law and facts would not be a judicial review."

Petitioner hardly had more enthusiasm for compiling and paying for a 1616 page record than Judge Finnegan had for reading it. Unfortunately, however, there is no other way to present to the reviewing court the evidence it must consider to determine whether the findings of fact are clearly erroneous. And there is no other way the reviewing court can discharge its duty to decide whether the findings are clearly erroneous than to consider the evidence.

It is true that in the case at bar Judge Duffy wrote an opinion concurring in the result, joined in by Judge Swaim, in which he stated that he had studied the record and concluded that although the questions were close the "clearly erroneous" rule required affirmance. However, it is not enough that two of the three judges of the Court of Appeals understood and discharged their duty.

Section 46(b) of the Judicial Code and Judiciary Act (28 U.S.C. 46(b)) requires that appeals be heard by a court or division of three judges, unless a hearing or rehearing is ordered *en banc*. If one of the three judges hearing the cause is remiss in his duty, or misinterprets it, as Judge Finnegan did here, the appellant has been deprived of the review provided for him as a matter of right by Section 24(a) of the Bankruptcy Act (11 U.S.C., 47 (a)). The abdication by one judge of his judicial duties in effect reduces the court to two judges, a result depriving the appellant of his statutory right to a hearing by a court composed of three judges, the right to have three judges with the benefit of their varying experiences, philosophies and abilities, consider his cause.

Petitioner had a right to have every judge on the Court of Appeals assigned to consider the case, consider it properly. Especially was this true as to the judge who had been assigned the responsibility of writing the opinion for the Court. Who can say what the result might have been had Judge Finnegan read the record and concluded that the findings of fact were clearly erroneous. It is not unlikely that in the Court's deliberations his views might have been persuasive to his colleagues. When Judge Finnegan declined to do that which the law required, petitioner was deprived of an important right conferred by Congress. This departure from a required course of judicial pro-

cedure calls for the exercise of this Court's power of supervision.

2. *The Courts Below Countenanced the Fraud and Perfidy of the Sussin Corporation's President.*

The crucial issue with regard to the ownership of the Marston promissory notes was whether they were received by Borrowdale, when they were mailed from New York, or by Freeman, as he contended. The Referee's conviction of Freeman for the theft of the notes depends entirely on Borrowdale's testimony that he received them. Borrowdale first said that when the notes and conditional sales contract securing them arrived in the mail he had his lawyer approve the contract and then attached the notes to the contract and put them in the top drawer of his desk where he kept his legal papers. (R. 202) Then, without explanation whatsoever, he immediately changed his testimony to state that he put the notes in the left hand drawer of his desk and the contract in the drawer where he kept his personal papers. (R. 202) He changed his testimony to separate the notes from the contract for he realized that if he left the impression that he had put the notes and contract, attached together, in the same drawer it would be difficult to sustain a charge against Freeman of stealing the notes but not the contract securing them, the contract having been in Borrowdale's possession all the time.

Borrowdale did not speak the truth when he said he received the notes from the Marston Company. (R. 202-3) It had sent with the notes its check for the payment of the July, 1952, installment due at the time the papers were mailed. (Freeman's Ex. 2, Ex. Vol. p. 34; R. 506-7) When this check which came with the notes was presented to Borrowdale on the witness stand he denied that he had received it. (R. 205; Receiver's Ex. 2, Ex. Vol. p. 3; R. 71)

He either swore falsely when he said he received the notes or he swore falsely when he denied receiving the check which accompanied them.

The fact that he did not speak the truth when he said he received the notes, which had been mailed on July 11, 1952 (R. 109), is further evidenced by his testimony that the notes and conditional sales contract were received in the mail at the same time. (R. 202-3) By the receiver's own documentary evidence, the letters of the Marston Company, which are conclusive on both the receiver and Borrowdale, it is shown that the conditional sales contract was not forwarded by the Marston Company with the notes but some time later, namely, between August 8, 1952, and September 30, 1952. (Receiver's Exs. 27, 26, Ex. Vol. pp. 26 and 25; R. 114, 107)

Also, Borrowdale testified with regard to the Marston checks for July and September, 1952 (the ones cashed by Freeman), that Sussin Corporation never knew "they were in existence until many months later." (R. 1010) It is shown by the cancelled Marston checks in evidence that each had a statement of account typed upon its face, in the upper left hand corner, giving the number of the note it discharged, the maturity date, and the principal and interest involved. Borrowdale cashed four of these checks, the ones for August and for the months of October through December, 1952. (Receiver's Exs. 3, 5 to 7, Ex. Vol. pp. 4, 6-8; R. 71) It is not possible that Borrowdale could have ignored the statements of account on the checks or failed to realize from them that the July and September remittances had been made. It can only be concluded then, that his testimony in the respect mentioned was completely false.

Borrowdale's letter of June 14, 1952, to the Sussin Sales Company purporting to confirm the purchase of cameras,

and his testimony with regard to it, are revealing illustrations of his complete carelessness with the truth. (Freeman's Ex. 6, Ex. Vol. p. 40; R. 507-8) Borrowdale said that this letter was dictated to his wife (who was unable to take shorthand or dictation, R. 188-9) and given to Freeman for Freeman's protection, to acknowledge his money in case he, Borrowdale, "got killed". (R. 1001, 1135) It is not strange in the light of Borrowdale's scheme of things that this letter makes no mention of the receipt of any money from Freeman nor does it afford him any protection whatsoever. Rather than to protect him, it was obviously designed to impress upon Freeman a form of contractual obligation.

An illustration of Borrowdale's contradictory testimony with regard to the price of the cameras allegedly sold to Freeman is the following (R. 228):

> "Q. In your answer to the petition of Freeman, you state that he ordered six cameras for twenty-four thousand dollars on June 14, 1952, is that right?
>
> A. Well, I think it was twenty thousand dollars.
>
> Q. Or twenty thousand dollars. Is your answer correct, that you swore to?
>
> A. That is right."

Considerably later in his testimony Borrowdale compounded this contradiction saying the same thing in reverse. (R. 1111)

Borrowdale placed in Freeman's mouth the statements that Freeman was the one who wanted to organize a corporation to buy cameras from Sussin Corporation. Borrowdale said Freeman first started the talk about a corporation. (R. 222) He said again that Freeman told him "to form a corporation" (R. 285), but on R. 1136 Borrowdale exposed this testimony as false when he said he was

the one who wanted the corporation and that Freeman said "No".

In addition to much documentary evidence of doubtful validity introduced by Sussin into the case, there were exhibits obviously spurious. One was its Exhibit 7. (Ex. Vol. p. 103; R. 585) Borrowdale testified this exhibit, an invoice addressed to Freeman dated *November 15, 1950,* was given to Freeman on or about its date and evidenced an agreement whereby Freeman promised that the Sussin Corporation could have all over $5,000 received from the sale of Freeman's 31" Consolidated camera, which had been moved in August, 1950, to its plant. (R. 311, 404) Freeman denied this version of the transaction. (R. 403-5) Borrowdale produced the old invoice, Exhibit 7, to give credence to his testimony. The camera was ultimately sold by Freeman in *December, 1952* for $8,500 (R. 586, 1006-7) and Borrowdale on the basis of this sale price claimed Freeman owed Sussin $3,500, the amount obtained over $5,000. The exhibit appears in part as follows:

MR. CARL FREEMAN *November 15, 1950*

INVOICE

• • •

TO BE SOLD: All over $5,000.00 Sussin Corporation is to receive from customer.

Balance due Sussin Corporation....$3,500.00

One glance at this invoice is sufficient to show that it is fraudulent, manufactured for the trial of this case, for Borrowdale could not possibly have known in *November, 1950,* the date of the exhibit, that the camera would be sold two years later for $8,500 and thereby produce $3,500 for Sussin as he claimed. Particularly, is this true for Borrowdale had testified earlier in the case that he thought the camera was worth $13,000. (R. 313)

On the trial Borrowdale attempted to delude the Court into believing that the Sussin Corporation was in good financial condition at the time of his transactions with Freeman. (R. 225) His purpose was to show that he or his company was not in need of the money Freeman testified he loaned it. (R. 246) In this vein Borrowdale testified his lawyer, Pabst, had obtained for him a "cash" judgment for $86,000 against the Consolidated Photo Engraving & Equipment Company. He evaded a direct question as to whether the judgment had been reversed and left the impression that he still possessed it. (R. 224) Borrowdale was not speaking the truth in this testimony for his judgment had been reversed by the Illinois Appellate Court in June, 1952, well over a year previous to the time of his testimony. *Borrowdale* v. *Sugarman, Trading as Consolidated Photo Engravers Equipment Co.*, 347 Ill. App. 390, 107 N. E. 2d 45. The official reports of that Court disclose that on retrial after remandment a judgment was entered in favor of the defendant which result was later affirmed by the Appellate Court. 4 Ill. App. 2d 164 (Abstract opinion No. 46,320—First District), 123 N. E. 2d 854.

In order to divert the trial court's attention from Borrowdale's dishonesty, evidenced in every issue of the case, the respondents Sussin and the receiver took advantage of Freeman's inartful pleadings to condemn him. In his pleadings he swore he had loaned Sussin $11,000. (R. 9) In his testimony he acknowledged that he had included in the $11,000 the cash consideration of $2,514 which he had paid Sussin for the Marston notes. (R. 759) Freeman, who is not a lawyer, explained his testimony by saying that he had bought the Marston notes, but that they had never been endorsed to him, that he had never been able to obtain the conditional sales contract, that the notes were

being paid to Borrowdale, not to him, and that he did not know where he stood. (R. 759, 775) He said in substance that if he was not the owner of the notes, Sussin owed him at least the amount he paid for them. (R. 791)

This confusion on the part of a lay person is understandable, however, Freeman's attorney did not appreciate the legal aspects, either, as is evidenced by his statements to the Court. (R. 371, 792-3, 1358) Had Freeman's position been pleaded in the alternative, no one would have been critical. The fact that the attorneys below and even the Referee recognized that the problem was a legal one seemed to make little difference. (R. 792) The very least that can be said for Freeman is that he explained the matter, but Borrowdale never attempted to explain any of his inconsistent and false statements for the reason, perhaps, that they were not explainable.

It is fair to say that Borrowdale was so hopelessly discredited and impeached by his own testimony and documentary evidence that his case was utterly destroyed. *Quock Ting* v. *United States,* 140 U. S. 417, 420-1.

The redolence of his testimony was intolerable even to counsel for Sussin who was required in his brief below to concede in a guarded way that Borrowdale's testimony was not worthy of belief.[1] The Referee's tolerance of Borrowdale's machinations may only be rationalized in the light of what occurred below. The Referee permitted himself to be diverted from the primary issue in the case, namely the issue of insolvency,[2] by the collateral trial right

[1] Counsel said (p. 78): "Even if Borrowdale's testimony should appear to be untrue in some instances, Freeman's contract, with reference to the six cameras and the down payment, has been amply proven * * *"

[2] The petitions of the intervening judgment creditors were adequate to carry the adjudication issue to a conclusion without a disposition of the Freeman-Sussin controversy.

of property question raised by the receiver. The receiver's petition appeared to be a simple matter at the outset, but, as we said below, turned into a *Jarndyce* v. *Jarndyce*. Freeman's counsel had some frustrating idiosyncrasies, a propensity for extended cross examination (R. 1260), a habit of reading lengthy passages of previous testimony back into the record (R. 173-176, 177-179), and other mannerisms which frustrated the Referee in his attempts to dispose of the litigation. The Referee was required to account to the District Judge for the delay in the proceedings (R. 1258) and placed the entire responsibility on Freeman's attorney. (R. 1260) The result was that Freeman by association with his counsel became *persona non grata.*

In addition, there developed early in the case an internecine enmity between counsel for Freeman, on the one hand, and the attorneys for Sussin and the receiver on the other. (R. 217-8, 1107, 1402) Under the circumstances the Referee's judgment, which ordinarily is excellent, was overcome.

The District Judge in his decision placed heavy reliance on the Referee. He so stated for the record. (R. 1567)

The Court of Appeals, in disposing of the case by extending the clearly erroneous rule to all facets of it, relied in turn on the District Judge and the Referee. Accordingly, for all practical purposes there has been no review of the Referee, a departure from the usual course of judicial proceedings of tragic consequence to the petitioner.

3. *The Court of Appeals Extended the Clearly Erroneous Rule to Conclusions of Law.*

The Court of Appeals in affirming the trial court applied the clearly erroneous rule to pure and substantial questions of law raised in the case. The Referee's order of May 4,

1954 dismissing Freeman's petitions for Sussin's adjudication found that it was not indebted to him for the reason that the moneys he advanced to it were payments on a contract to purchase cameras, rather than loans. (R. 1421, 1537) Thus, the finding of a valid and binding contract was decisive of this major issue in the case.

Petitioner submitted the proposition to both the Court of Appeals and the District Court that, considering only the evidence adduced by the Sussin Corporation on the issue of the existence of a contract to purchase cameras and conceding, *arguendo,* the existence of an agreement purporting to be a contract, it had no binding force because of a complete failure of a meeting of the minds of the parties.[1] Petitioner submitted that the terms of the purported contract in every essential thereof were so indefinite in Borrowdale's mind, regardless of what was in Freeman's mind, that the promises and performances of the parties could not be either ascertained or enforced.

The law on this fundamental principle of contracts that the minds of the parties must meet on essential terms is uniformly recognized. *Hausman Steel Co.* v. *N. P. Severin Co.,* 316 Ill. App. 585, 589; 45 N. E. 2d 552, 554. *Obartuch* v. *Security Mutual Life Insurance Co.,* 7 Cir., 114 F. 2d 873, 878.

The contract found by the Court in the case at bar is unique in that all of the essential elements are indefinite and in confusion. The vendee could be Freeman individually, Borrowdale and Freeman as partners, or possibly a *de facto* corporation termed "The Sussin Sales Company".

[1] Respondent Sussin raised for the first time in the Court of Appeals, in its answer to the petition for rehearing, the point that this proposition of law was not argued in the trial court. The question was argued there and if this statement is challenged petitioner will print for this Court its argument before the District Court.

No one knows what was purchased, whether basic cameras, basic cameras with screen-raising mechanisms or cameras with other attachments. Borrowdale conceded the order was not a full order. (R. 1125) The price to be paid per camera, as Borrowdale testified, could be "x-times $20,000.00." (R. 1109) The time of performance was never fixed either as to the due date of the "advance payment" or as to the time the cameras were to be delivered. The date of the contract is not fixed, either.

The issue as to the legal force or effect of the agreement for the purchase of cameras is a pure question of law. In *Higby* v. *Rust,* 112 Ill. App. 218 (affirmed 211 Ill. 333), the Court said (p. 222):

> "Where there is no dispute as to the language of the parties (whether oral or in writing) which it is claimed establishes the contract, *the question of its existence is purely one of law.*" (Italics Supplied)

It was also so held in *Bertlee Company, Inc.* v. *Illinois Publishing and Printing Company,* 320 Ill. App. 490, 511; 52 N. E. 2d 47, 56.

The Referee found that the contract between Freeman and Sussin for the purchase of cameras was "evidenced by a writing," namely, the agreement signed by Freeman with the Diamond Foundry Company. (R. 1528; Freeman's Ex. 10, Ex. Vol. p. 44; R. 507-8) It was by this contract that Freeman restored the credit of the Sussin Corporation by agreeing to settle its old obligations to the Foundry Company and to pay $1,000.00 on the purchase of six sets of *castings* for cameras. There is no mention in the agreement of six cameras or the purchase thereof, nor are any other elements present requisite to a contract for their purchase. This finding of the Referee involved the interpretation of a written document and was a pure question

of law. The Illinois Supreme Court in *Telluride Power Co. v. Crane Co.*, 208 Ill. 218, 70 N.E. 319, 322, said (p. 226):

> "The questions as to what writings should be considered, and whether or not those considered constituted a written contract, and whether or not the written contract fully expressed the agreement between the parties, were for the court."

Additional questions of law raised on the appeal involved the validity of the Referee's orders of May 21, 1954 (R. 1475) and June 21, 1954 (R. 1502). The first order turned over to the reclamation petitioners, the "Borrowdale Brothers," certain trucks and property in the possession of the receiver. It was entered without the introduction of any evidence whatsoever. It in effect operated as a finding of title in the reclamation petitioners and provides for them a basis for a suit against Freeman for damages on account of the detention of the property in question. Freeman was not given an opportunity to defend against the petition. (R. 1474) In the natural order of things Freeman could be deprived of his property without due process of law, on the *res judicata* effect of this order.

The order of June 21, 1954, involved the dismissal of the intervening petitioners without costs. These petitioners had entered into the proceeding with full knowledge of the issues between Freeman and Sussin. It was on the basis of their judgments that the Receiver was appointed. (R. 29-30) They participated actively in the adjudication issues of the case and for the Referee to permit these creditors to withdraw without costs with the intent of saddling the entire costs on Freeman was grossly unjust and an improvident exercise of his judicial discretion. As such, the making of the order posed a question of law.

In *D. M. W. Contracting Co.* v. *Stolz,* 158 F. 2d 405, 407, the court held that a district judge under the clearly erroneous rule was "in no instance bound by the master's conclusions of law." The same principle obviously applies to the Court of Appeals. The decisions of this Court on mixed questions of law and fact are to the same effect. *United States* v. *United States Gypsum Co.,* 333 U.S. 364, 396, and *Bogardus* v. *Commissioner of Internal Revenue,* 302 U.S. 34, 39.

The Court of Appeals in extending the clearly erroneous rule in the case at bar to the questions of law under discussion clearly gave it an application never intended by Bankruptcy General Order 47 or Federal Rule 52 (a) and was action in conflict with the cited decisions of this Court.

4. *The Manifest Error in the Judgments Below.*

With regard to the question of whether a contract was made for the purchase of cameras, the trial court gave no consideration to the utter improbability of Freeman's entering into a contract which could cost him $20,000, $24,000 or x-times $20,000, and pay thereon in advance $20,000 without the delivery of any merchandise or without any security for his money whatsoever. Also the Court below failed utterly to consider that the evidence of Sussin, if it preponderated in any direction, went to show that the purported contract was between it and a partnership composed of Borrowdale and Freeman. Under the Illinois law of partnerships the liability of partners for the debts and obligations of the partnership is a joint one. (Sec. 15, Ch. 106½, Ill. Rev. Stat. 1953) And the possible joint liability involved in such case could not be the subject of a counterclaim in bankruptcy by

Sussin Corporation against Freeman, being only one of the joint obligors. *Gray* v. *Rollo,* 85 U.S. 629, 633-4.

On the issue of title to the Marston notes, the trial court found that Borrowdale received the Marston notes from New York, which finding was based on perjury, as has been shown in this petition. Freeman's conviction of taking the notes was predicated on the gossamer evidence contained in the testimony of Borrowdale and his son to the effect that Freeman was seen going through Sussin's mail, and through desks at the plant. As against this evidence Freeman produced the envelope in which the notes were mailed from New York, as to the probative force of which no reasoned answer has ever been made in the case, and was given by Borrowdale the Marston payment for August, 1952, in the form of a cashier's check in precisely the same amount he received from the Marston Company. Borrowdale never answered the inference which sprung from this payment that he gave Freeman the money because he was the owner of the notes. In addition, Borrowdale conceded three times in his testimony that Freeman had a $1500 interest in the notes.

The finding below that Freeman was not an eligible petitioning creditor overlooks the stipulation of the parties as to the amount he paid to or for the benefit of the Sussin Corporation, namely $10,968.09 (R. 768), which demonstrates its liquidity and the fact that at the time of the commencement of the bankruptcy proceeding nothing remained to occur in the future, beyond the control of Freeman, to fix its certainty. 11 U.S.C., 95(b), *Maynard* v. *Elliott,* 283 U. S. 273, 278.

That a gross miscarriage of justice occurred below is evident by the result of the Referee's orders as confirmed by the District Court, in that Freeman was essentially

convicted of stealing and forgery on the flimsiest of evidence, he lost the Marston notes and $11,000.00 of his money was given outright to the Sussin Corporation. It stands protected by the Referee's order of May 4, 1954, from ever returning it. The irony of the situation is that this money, or a major portion of it, was used to resuscitate the Sussin Corporation from a financial abyss, it parried off the appointment of an equity receiver, it satisfied judgment creditors who were harassing it and the money furnished it with castings and materials so it could commence production. Freeman has received nothing for his money and must defend himself against petitions for fees (R. 1615) and damages in excess of $60,000.00 filed in the court below. (R. 1615) He has the additional prospect of suits being filed against him for malicious prosecution.

Counsel for Sussin in its brief below said Freeman could pay the balance of his contract and receive the cameras. A fair question in response to this is: What is the balance to be paid and should its amount be within the whim and caprice of Borrowdale to determine?

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

FRANCIS B. STINE,
Counsel for Petitioner.

APPENDIX A.

OPINION.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 11304. OCTOBER TERM AND SESSION, 1955.

In the Matter of
THE SUSSIN CORPORATION,
A Corporation,
Alleged Bankrupt.

CARL E. FREEMAN,
Appellant,
vs.
THE SUSSIN CORPORATION,
Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

November 8, 1955.

Before DUFFY, *Chief Judge*, FINNEGAN and SWAIM, *Circuit Judges.*

FINNEGAN, *Circuit Judge.* On several prior occasions, including, *inter alia, In Re Garden City Brewery,* 208 F. 2d 377 (7th Cir. 1954) we reiterated our reluctance, buttressed by sound precedent, to annul referees' findings, certificates and reports confirmed by district judges sitting in bankruptcy. The prolix record, now before us, is

utterly devoid of any legal basis for departing from our prior decisions. We also point out, at the threshold of this opinion that the Sussin Corporation has not yet been adjudicated a bankrupt and any question of its solvency is absent from the current appeal. Our order granting supersedeas, entered November 30, 1954, contains its own expiration date. Since the brief and record contain confusing designation of the participants in this proceeding we shall identify them by their respective personal names.

Carl E. Freeman filed a verified involuntary petition, February 20, 1953, to adjudicate Sussin Corporation, incorporated in Illinois, as a bankrupt and thereafter Richard Rex Parkin was appointed receiver. Parkin, acting in that capacity, petitioned for a rule on Freeman seeking to compel the turnover of certain notes and cash. In his single creditor petition, Freeman claimed $13,680 from Sussin for moneys loaned and services rendered. Responding to that petition, Sussin denied both its insolvency and the existence of any indebtedness to Freeman. Sussin also asserted several defensive counter-claims against Freeman. The district judge appointed the receiver, March 20, 1953, at the request of Freeman, through his counsel, and at the same time referred the matter to Referee MacChesney. When that referee's term of office expired the case was referred, generally, to Austin Hall, Referee in Bankruptcy. Freeman's petitions for review of several orders,[1] entered by Hall, were

[1] May 3, 1954 (T. R. 1413), the referee's direction to Freeman to turn over eleven notes, signed by Marston & Co., and payable to Sussin; May 4, 1954 (T. R. 1421) dismissing the petition, amended petition, etc., for adjudication of Sussin as a bankrupt; May 21, 1954 (T. R. 1475) ordering the Receiver to turn over certain trucks and a trailer to the "Borrowdale Brothers"; June 21, 1954 (T. R. 1502) dismissal of intervening petitions of named creditors other than Freeman.

denied and dismissed by order entered September 24, 1954, confirming Hall's report, from which Freeman now appeals. In each of the four instances where he entered orders complained of by Freeman, the Referee filed comprehensive certificates pertaining to Freeman's petitions for review. Freeman, in substance, would have us re-weigh the evidence shown in this 1616 page record and evaluate the credibility[2] of witnesses who appeared before the Referee. We decline to do so. For that reason it is unnecessary to perform an autopsy on the evidence and then state our version of what is traced in the record. Freeman, in our opinion based upon careful examination of his briefs, has, simply raised tenuous points in his appeal.

No sound reason appearing for disturbing the district judge's final order of confirmation, the judgment appealed is affirmed.

AFFIRMED.

---

[2] **e.g.** The third "contested issue" in Freeman's brief (p. 43): "Whether or not the entire defense of the bankrupt is worthy of any verity in view of the welter of conflicting statements and self-impeachment of the president of the bankrupt."

DUFFY, *Chief Judge.* Concurring in result.

The issues before us on this appeal were tried out for several months before two Referees. Freeman filed his single creditor petition on February 20, 1953. Judge Barnes appointed a receiver on March 20, 1953, and on the same date referred the cause to Referee MacChesney by an order of general reference. Referee MacChesney heard a large amount of testimony on such questions as that of adjudication, turn-over of trucks, and other matters. However, Referee MacChesney's term of office expired on June 4, 1953, and he was not reappointed. Testimony thereafter taken before Referee Hall duplicated, in some respects, that given before Referee MacChesney.

I do not agree with the statement in Judge Finnegan's opinion that Freeman has "* * * simply raised tenuous points in his appeal." After studying the record herein, I have concluded that Freeman's contentions on this appeal were not frivolous. True, the record is prolix, but there is much evidence that tends to support Freeman's claims, and had the Referee found in his favor and had these findings been confirmed by the District Court, I would think this Court would be required to affirm on appeal.

Russell W. Borrowdale testified: "I am the Sussin Corporation." It is clearly evident from the record that Borrowdale was the Bankrupt's *alter ego.* There were many transactions between Borrowdale and Freeman, the terms of which were known only to those two persons. There can be no doubt that between May 14, 1952 and September 24, 1952 Freeman advanced considerable sums to Borrowdale. The question of whether Freeman or the Bankrupt owns the Marston promissory notes appears to me to be a close one on this record.

However, Bankruptcy General Order 47 provides that the judge shall accept the Referee's findings of fact unless clearly erroneous. We have held that the weight to be accorded Referee's findings of fact is similar to the weight to be accorded findings of Masters and verdicts of juries. *In re Morris*, 7 Cir., 153 F. 2d 178. A Referee's order affirmed by the District Court will not be set aside unless clearly erroneous. *In re Pringle Engineering & Mfg. Co.*, 7 Cir., 164 F. 2d 299.

Applying these rules I cannot say that the Referee's findings confirmed by the Court, were clearly erroneous. I therefore agree that the judgment of the District Court should be

AFFIRMED.

SWAIM, *Circuit Judge*. For the reasons assigned in Judge Duffy's concurring opinion, I also agree that the judgment of the District Court should be AFFIRMED.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B.

Statutes and Rules Involved.

28 U.S.C., Chapter 3—Courts of Appeals, Section 46(b)(c)(d).

"§ 46. Assignment of judges; divisions; hearings; quorum.

"(b) In each circuit the court may authorize the hearing and determination of cases and controversies by separate divisions, each consisting of three judges. Such divisions shall sit at the times and places and hear the cases and controversies assigned as the court directs.

"(c) Cases and controversies shall be heard and determined by a court or division of not more than three judges, * * *.

"(d) A majority of the number of judges authorized to constitute a court or division thereof, as provided in paragraph (c), shall constitute a quorum."

11 U.S.C., Chapter 4, Section 47(a). [Section 24(a), Bankruptcy Act.]

"§ 47. Jurisdiction of appellate courts.

"(a) The United States courts of appeals, * * * as now or as they may be hereafter held, are invested with appellate jurisdiction from the several courts of bankruptcy in their respective jurisdictions in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise, or reverse, both in matters of law and in matters of fact: * * *."

11 U.S.C., Chapter 6, Section 95(b). [Section 59(b), Bankruptcy Act.]

"§ 95. Who may file and dismiss petitions.

* * *

(b) Three or more creditors who have provable claims liquidated as to amount and not contingent as to liability against any person which amount in the aggregate in excess of the value of securities held by them, if any, to $500 or over, or, if all of the creditors of such person are less than twelve in number, then one or more of such creditors whose claim or claims equal such amount, may file a petition to have him adjudged a bankrupt. [As amended July 7, 1952, ch. 579, § 16, 66 Stat. 425.][1]

Ill. Rev. Stat. 1955, Chapter 106½—PARTNERSHIP, Section 15[2].

"15. [Joint liability of partners.] § 15. All partners are liable

"(a) Jointly and severally for everything chargeable to the partnership under Sections 13 and 14.[3]

"(b) Jointly for all other debts and obligations of the partnership; but any partner may enter into a separate obligation to perform a partnership contract."

Order 47. General Orders in Bankruptcy. [11 U.S.C., Order 47, fol. § 53.]

"Order 47. Reports of Referees and Special Masters.

"Unless otherwise directed in the order of reference the report of a referee or of a special master shall set forth his findings of fact and conclusions of law, and the judge shall accept his findings of fact unless clearly erroneous. The judge after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions."

---

[1] Amendment effective three months after July 7, 1952.

[2] Filed June 28, 1917, Laws 1917, p. 625.

[3] Sections 13 and 14 have no application to the case at bar.

Rule 52. Rules of Civil Procedure for District Courts. [28 U.S.C., § 2072, Rule 52.]

"Rule 52. Findings by the Court.

"(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; * * *. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. * * *."

MAR 1 1956
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 666

CARL E. FREEMAN,

Petitioner,

vs.

THE SUSSIN CORPORATION, a Corporation, Alleged Bankrupt, and
RICHARD REX PARKIN, Receiver,

Respondents.

BRIEF ON BEHALF OF THE SUSSIN CORPORATION, ALLEGED BANKRUPT, RESPONDENT.

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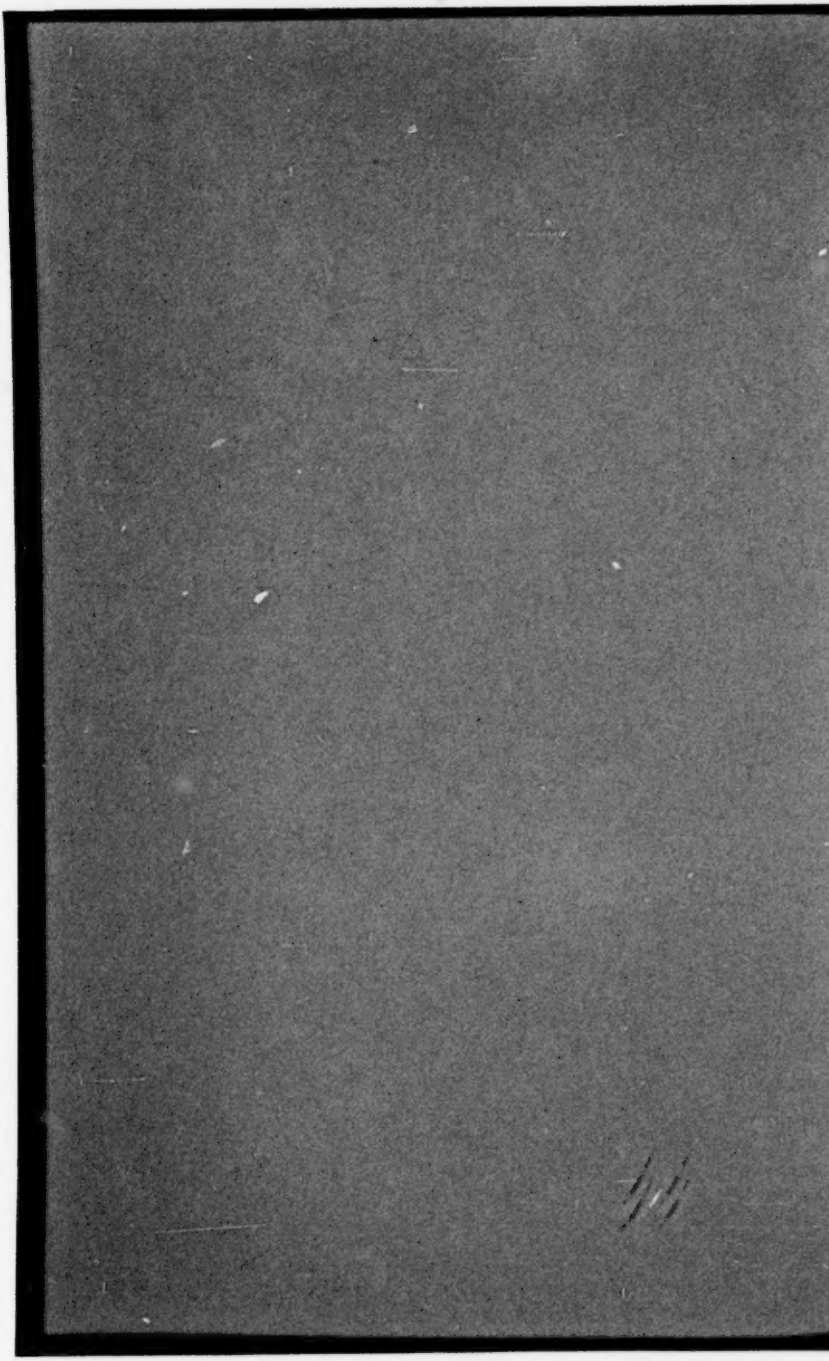

INDEX.

PAGE

The Issues and The Evidence 1-9

Reasons for Denying The Writ of Certiorari 30-46

1. This Court cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional error. 10, 31, 32, 34

2. A Reviewing Court will not reverse the findings of the Trial Court where that Court, or the Referee, has had the opportunity to hear the witnesses and to form an opinion as to their veracity. The judgment of the Trial Court is presumed to be correct. 11-14

3. Freeman's petition for the adjudication of the Sussin Corporation as a bankrupt was properly dismissed for the reason that he did not have a provable claim against said company, "liquidated as to amount and not contingent as to liability." 15-17

4. Where a "one man" petitioner seeking the adjudication of a corporation as a bankrupt alleges in his petition that such corporation has less than twelve creditors with knowledge that it has more than twelve creditors, the petition should be dismissed. 17-20

PAGE

CITATIONS.

Cases:

Adair v. Shallenberger, 119 Fed. (2) 1017 13

Aetna Insurance Co. v. Rhodes, 170 Fed. (2) 111 ....6, 14, 43

Bertlee Co. v. Ill. Publishing and Printing Co. 42

Besser Mfg. Co. v. U. S., 343 U.S. 444 34

Bishop v. U. S., 223 Fed. (2) 582 34

Borgardus v. Commissioner of Internal Revenue, 302 U.S. 34, 39 44

Brown v. Allen, 344 U. S. 443 34

In re Central Ill. Oil & Refining Co., 7th Cir. 133 Fed (2) 657, 660 15

Commercial Casualty Ins. Co. v. Stinson, 111 Fed. (2) 63 (Cert. denied, 311 U.S. 667) 13

D.M.W. Contracting Co. v. Stolz, 158 Fed. (2) 405, (Cert. denied 330 U.S. 839) 33, 44

Encyclopedia of Federal Procedure, 3rd Ed. Vol. 8, Sec. 26.113 28

In re Garrett & Co. (7th Cir.) 134 Fed. (2) 227 15

Graver Tank & Mfg. Co., Inc., et al. v. Linde Air Products Co., 336 U.S. 271 10

Hadley v. White, 367 Ill. 406 29

Hausman v. N. P. Severin Co., 316 Ill. App. 585 40-41

In re Heffron, Fed. case No. 6321 (DC 111) 43

Hicks v. Sunray Oil Co., 5 Cir. 139 Fed. (2) 937 6

Higbie v. Rust, 112 Ill. App. 218, 222 42

PAGE

LaRue v. United Trust Co., 181 Fed. (2) 895 13

Mann v. Arkansas Valley Land and Cattle Co., 24 Fed. 261, 267 27

National Mut. Casualty Co. v. Eisenhower, 116 Fed. (2) 891 13

Navison Shoe Co. v. Lane Shoe Co., 36 Fed. (2) 454 18

Norfolk & W. Ry. Co. v. McKenzie, 116 Fed. (2) 632, 635 27

Obartuch v. Security Mutual Life Ins. Co., 114 F. (2) 873 41

O'Leary v. Turner, 209 Fed. (2d) 149 16

Parker v. Ross, 234 Fed. 289 (Cert. denied 242 U.S. 634) 13, 28

Quong Ting v. U.S., 140 US 417, 420-1 38

In re Rosenburg Trust Co. of Chicago v. Murphy et al., 138 Fed. (2) 409 (7th Cir.) 14

Sampsell v. Monell, 162 Fed. (2) 4 14

Sapero v. State Board of Medical Examiners, 90 Colorado 568 33

In re Security Motor Co., 51 Fed. (Suppl.) 559 12

In re Simon, 216 F. 2nd 339 (7th Circuit) 37, 38

In re The Strathdon, Burrell, et al. v. Armstrong et al., 119 Fed. Supp. 724 16

Telluride Power Co. v. Crave Co. 42

Texas & N.O.R. Co. v. Ry. Clerks, 281 U.S. 548 10

Thompson v. Northern Hotel Co., 256 Ill. 77 29

PAGE

United States v. Johnston, 268 U.S. 220 10

U. S. v. Oregon State Medical Society et al. 31

U. S. v. U.S. Gypsum Co., 333 U.S 364, 395 .....32, 44

Wellman v. U. S., 297 Fed. 925 27

Wetzel v. Schaefer, 124 Fed. (2) 308 (Cert. denied, 316 U.S. 678, rehearing denied 317 U.S. 704 13

Zimmerman v. Harding, 227 U.S. 489, 33 S. Ct. 387, 57 L. Ed. 608 .....6, 43

Statutes and Rules:

Rule 19, Sec. 1(b), Supreme Court Rules 10

Rule 52(a) Rules of Civil Procedure for District Courts 10

IN THE

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CARL E. FREEMAN,

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RICHARD REX PARKIN, Receiver,

Respondents.

BRIEF ON BEHALF OF THE SUSSIN CORPORATION, ALLEGED BANKRUPT, RESPONDENT.

May it please the Court:

In answering Petitioner Freeman's brief, reference will be made to the numbered pages thereof.

At the very beginning of this brief on behalf of The Sussin Corporation this Court's attention is called to the fact that Referee Hall and Judge Barnes in the trial court have

decided this case on a pure question of fact. Freeman never raised any question of law before the referee or the trial court. His entire argument there was based upon whether he or the witnesses for The Sussin Corporation had told the truth. Both the referee and the trial court found in favor of The Sussin Corporation. The Court of Appeals affirmed that decision.

ANSWER TO PETITIONER'S STATEMENT OF THE CASE.

The Proceedings Below.

On pages 4 to 7 of his brief in support of his petition here, Freeman sets forth what he calls a statement of the proceedings below. That statement gives his theory of the case, entirely omitting very material portions of the pleadings as well as the evidence in the record, all of which entirely defeats his petition here. Freeman fails to state that in his original "one-man" verified petition for the adjudication of The Sussin Corporation as a bankrupt, as well as in his verified first and second amended petitions therefor and again in his verified petition for the appointment of a receiver for that company, he swore that (1) The Sussin Corporation owed him $11,000.00 *for money loaned* and $2,680.00 *for services performed*; (2) The Sussin Corporation had less than twelve creditors; and (3) he had a provable claim against it "liquidated as to amount and not contingent as to liability" (R. 8-9).

Freeman concedes on page 4 that he did not have a claim for services performed. He made the same admission before the Court of Appeals. His first attorney, John O. Wagner, stated twice before Judge Barnes that The Sussin Corporation had twenty creditors (R. 25, 27), although Freeman's verified petition was sworn to before that same

attorney Wagner as a notary public (R. 8-10). Furthermore, Freeman's present able counsel argued before Referee Hall that The Sussin Corporation had more than thirty creditors (R. 1455, 1503-1505).

When The Sussin Corporation filed its verified answer denying any indebtedness on its part to Freeman and alleging that Freeman agreed to buy from it six large cameras with a down payment of $20,000, Freeman immediately "went shopping" for additional creditors to support him. John O. Wagner, then his attorney, with Freeman's approval, paid attorney Michael Gesas $1,200.00 for causing three other creditors of The Sussin Corporation to intervene (R. 1219, 1220, 1248).

Freeman entirely overlooks the fact that in his verified answer to the receiver's petition seeking a rule on him to turn over certain Marston notes and cash procured by him by unlawfully cashing two checks given to The Sussin Corporation in part payment for the large camera sold by it to Marston, Freeman swore that he had loaned Marston the money to buy that camera (R. 64-65), whereas he swore on the witness stand that he bought the Marston notes from The Sussin Corporation (Freeman's Exs. 48, 49, Ex. Vol. p. 81-82).

Russell W. Borrowdale, Sr., president of The Sussin Corporation, testified to said purchase by Freeman of said six cameras (R. 207, 227, 228-230, 273, 408-413, 952, 953, 981). The Sussin Corporation acknowledged Freeman's order for the six cameras by letter on June 14, 1952. *Freeman himself introduced that letter as his own exhibit* (Ex. 6, p. 40 of Ex. Vol.). Freeman cannot impeach his own exhibit.

As Freeman states on page 10, it was stipulated that he advanced to The Sussin Corporation the total sum of

$10,968.09 for all purposes whatever they might have been according to Freeman's theory this was originally supposed to constitute the alleged loan of $11,000.00 set forth in his verified original and first and second amended petitions for adjudication of The Sussin Corporation as a bankrupt.

Freeman claims at the foot of page 10 that $2,514.00 of the above sum was paid for the Marston notes. That being true, Freeman could not possibly have loaned The Sussin Corporation $11,000.00. Freeman having agreed to purchase the six cameras, could not have loaned The Sussin Corporation anything. Neither could Freeman have bought the Marston notes from The Sussin Corporation.

Borrowdale's testimony that Freeman agreed to buy the six cameras from The Sussin Corporation and to make the down payment of $20,000.00 thereon is clearly and conclusively corroborated by Tom Borrowdale (R. 916-933), Russell W. Borrowdale, Jr., (R. 939-990), Daniel Srnec of the Diamond Foundary Co. at Waukesha, Wisconsin, (R. 1034-1055), T. M. Beaumont of the Beaumont Foundry Co. of Kankakee, Illinois, (R. 1058-1063) and Albert Froling, a former employee of The Sussin Corporation (R. 1170-1209). Freeman himself signed a contract with the Diamond Foundry for the first six sets of castings for the six cameras (Freeman's Ex. 10, Ex. Vol. 44-47) and wrote the Diamond Foundry stating that if the first six sets of castings were satisfactory another six sets would be ordered soon (Sussin Corp.'s Exs. 18, 20, 21; Ex. Vol. pp. 118, 122, 124; Freeman's Ex. 11-18; Ex. Vol. pp. 48-55). Freeman, in every instance, testified that he and Borrowdale were all alone whenever he had any conversations with reference to the points at issue (R. 438, 445, 451, 462, 483, 485, 1228, 1229, 1232 and many others). Therefore Freeman had no corroboration whatsoever as to any of the questions discussed. He undoubtedly thought it wise to so testify.

He entirely overlooked the necessity of having corroboration.

It is difficult to understand how the present counsel for Freeman knows what the trial court had in mind in appointing a receiver and requiring Freeman alone to furnish bond (see last par. of p. 4 of Freeman's brief here).

It necessarily follows that Freeman could not possibly have loaned The Sussin Corporation anything. On the contrary the money which he advanced to The Sussin Corporation was to apply on the $20,000.00 down payment for the six cameras.

At the foot of page 5 and the top of page 6 Freeman complains that on May 24, 1954, Referee Hall entered an order, over Freeman's objection, directing the return to Borrowdale Bros., of certain trucks and other personal property without permitting Freeman to file responsive pleading and without evidence. On the contrary at the foot of page 6 Freeman states that the entire question as to the ownership of that property was tried before Referee MacChesney a year earlier (before Freeman's present counsel appeared in the case). Neither Freeman nor the receiver offered any evidence whatsoever on the question of the ownership of the property by Borrowdale Bros. The pleadings evidence and briefs filed by all parties were at all times available to Referee Hall. *Furthermore, at the time the turn-over order was entered on May* 21, 1954 *Freeman's petition had already been dismissed on May* 4, 1954.

Freeman's present counsel did not see fit to present the transcript of the record before Referee MacChesney to Referee Hall, to make that testimony a part of the record on Freeman's appeal to the Court of Appeals or to make it a part of the record here. Where a party does not bring up on appeal the transcript of the record before the trial court, the presumption arises that that evidence would sup-

port the orders of the referee and the trial court complained of. The receiver took possession of that property upon specific demand made by Freeman through his attorney, Wagner. There was evidence in the record upon which to base Referee Hall's order. Furthemore that portion of the record which Freeman did not see fit to bring to the Court of Appeals and to this Court shows clearly that his present counsel agreed to the return of the Borrowdale Bros. property. If necessary that portion of the record can be supplied here.

In the case of *Aetna Ins. Co.* v. *Rhodes,* 170 Fed. (2) 111, the Court said on page 115:

> " 'Where the evidence is not a part of the record it will be presumed that it supports the jury's verdict and the court's judgment.' "

That Court cited many cases in support of its opinion among which is that of *Zimmerman* v. *Harding,* 227 U.S. 489, 33 S. Ct. 387, 57 L. Ed. 608 and that of the case of *Hicks* v. *Sunray Oil Co.,* 5 Cir. 139 Fed. (2) 937, where it was held that where evidence is not included in the record on appeal, the Court of Appeals must assume that there was evidence before the trial court to support its findings.

On page 6 Freeman states that on October 8, 1954, the receiver was ordered to return to The Sussin Corporation its property and to make his final report. Freeman fails to state that at that very time The Sussin Corporation filed a written motion with Referee Hall *seeking to have the receiver discharged.* That part of the motion was stricken upon the express objection of the present counsel for Freeman. Therefore the receiver has never been discharged to this date thereby hindering, embarrassing and damaging The Sussin Corporation in the conduct of its business. Freeman's present counsel expressly stated before Referee Hall that he objected to the discharge of the receiver but

that he would agree to the return of The Sussin Corporation's property to it thereby reducing Freeman's liability on his supersedeas bond in the Court of Appeals. Freeman has conveniently omitted his own counsel's statement from the record before the Court of Appeals, as well as before this Court.

Freeman's statement at the top of page 7 that The Sussin Corporation has never been found solvent is entirely irrelevant. Freeman is not a creditor. Referee Hall, the trial court and the Court of Appeals have all found that The Sussin Corporation was not indebted to Freeman in any sum whatsoever and that his petition for adjudication was not filed in good faith.

On pages 7 to 20, Freeman pretends to state "The substance of the evidence." On the contrary those pages set forth nothing more than plain argument and the expression of his personal opinion, wherein Freeman's present able counsel quotes only such testimony as he deems beneficial to his client, Freeman, and entirely omits even a fair reference to the evidence herein referred to.

Nowhere in the record does Freeman deny that he was a former partner of George Zilligen in the Hawtin Engraving Co. which was being moved from Harrison and Wells Streets to Harrison and Clark Streets, Chicago, where Freeman was purchasing the Columbia Engraving Co. Freeman asked Zilligen to continue as a partner in Columbia Engraving Co. which Zilligen refused to do because Freeman attempted to induce Zilligen to pay as much for a one-half interest in Columbia as Freeman was actually paying for the entire interest. This was all without Zilligen's knowledge (R. 1159).

Neither does Freeman deny that his original attorney, John O. Wagner, withdrew from the trial of this case because Freeman did not pay him (R. 1387, 1389, 1393, 1402,

1429, 1430). Freeman does not deny that he failed to pay the court reporters (R. 1390). The present able counsel for Freeman stated to Referee that he could not get the record (R. 1432). Freeman admits that he lied (R 1393). He said to Referee Hall "Let them get in all the dirt they want" and again "It is a farce" (R. 1249).

A careful examination of Freeman's objections to the orders entered by Referee Hall and Judge Barnes in the trial court will plainly show that never at any time did Freeman's present counsel ever raise the legal question as to whether Freeman's contract to purchase six cameras had any "legal efficacy" as he states on page 7. This will appear from Freeman's petitions for review in the trial Court (R. 1475, 1481, 1484, 1503). In fact Freeman states that the order entered by Referee Hall dismissing his petition is *overwhelmingly against the weight of the evidence.* (R. 1485). In his petition for the review of Referee Hall's order directing him to turn over the Marston notes and cash to the receiver, Freeman alleges that the *findings and conclusions in said order are contrary to the weight of the evidence.* It is therefore entirely clear that Freeman's only question before the trial court was a *question of fact.* In the note at the foot of page 1 of his brief Freeman gives the record pages where Referee Hall's certificates on review are set forth. See Freeman's petitions for review. (R. 1475, 1481, 1484, 1503)

On pages 7 to 20 Freeman persists in quoting from the testimony of the various witnesses in referring to various exhibits introduced by the parties in this case in an attempt to convince this court that Referee Hall, Judge Barnes and the Judges of the Court of Appeals should have found from the evidence as a question of fact that at the time Freeman filed his original and first and second amended petitions seeking the adjudication of Sussin Corporation as a bankrupt: (1) The Sussin Corporation was indebted

to him for a loan; (2) it had less than twelve creditors and; (3) he had a *provable claim* against that company, *"liquidated as to amount and not contingent as to liability"*; in spite of the fact that: (1) five witnesses corroborated Borrowdale, Sr., when he testified that Freeman had agreed to purchase from The Sussin Corporation six cameras with a down payment thereon $20,000.00 (see page 4 of this brief) and; (2) in spite of the fact that Freeman's first attorney, John O. Wagner, (R. 25, 27) as well as his present counsel, (R. 1455) stated in open court that The Sussin Corporation had twenty or thirty creditors. Furthermore, on pages 15 to 20 Freeman strenuously argues that Referee Hall and Judge Barnes as well as Judges of the Court of Appeals should have found and that this court should find on the evidence in this record that he bought and paid for the Marston notes. This is in spite of the fact that he himself states on page 10 that $10,968.09 was all of the money that he had ever advanced to The Sussin Corporation for any purpose and in spite of the further fact that Borrowdale Sr., and five witnesses testified that Freeman had agreed to buy the six cameras with a down payment of $20,000.00 (See page 4 of this brief).

The fair preponderance of all of the evidence in this record clearly proves that Freeman loaned nothing to Marston to buy the camera from The Sussin Corporation. and that he did not buy the Marston notes from The Sussin Corporation. By reason of the fact that Freeman agreed to buy the six cameras he could not have loaned the Sussin Corporation anything for any purpose. Admitting for the purpose of argument that Freeman actually *bought* the Marston notes he could not have loaned The Sussin Corporation $11,000.00. In view of the evidence in this record Freeman can not honestly say that he has a provable claim against The Sussin Corporation "liquidated as to amount and not contingent as to liability." See Subdivision III of this brief.

I.

This Court cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional error.

Rule 19(1) of this Court states that a review on writ of certiorari is not a matter of right but of sound judicial discretion and will be granted only where there are special and important reasons therefor.

In the case of *Graver Tank & Mfg. Co., Inc., et al.* v. *Linde Air Products Co.,* 336 U.S. 271, this court, after quoting from Rederal Rule 52 (a) on page 274, said on page 275:

> "A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two Courts below in the absence of a very obvious and exceptional error. *Goodyear Tire & Rubber Co.* v. *Ray-O-Vac Co.,* 321 U.S. 275; *District of Columbia* v. *Pace,* 320 U.S. 698; *Williams* v. *United Shoe Machinery Corp.,* 316 U.S. 364; *Baker* v. *Schofield,* 243 U.S. 114, 118. No such showing is made. In the *Goodyear* case 321 U.S. 275 this court said on page 278: 'The Circuit Court of Appeals re-examined the findings in the light of the evidence and accepted them. It must be a strong case in which this Court will set aside these concurrent findings of two courts. We think this is not such a case.'"

In the case of *United States* v. *Johnston,* 268 U.S. 220 this court said on page 227:

> "We do not grant a certiorari to review evidence and discuss specific facts."

In the case of *Texas & N.O.R. Co.* v. *Ry. Clerks,* 281 U.S. 548 this court said on page 558:

> "On the questions of fact, both courts below decided against the petitioner. Under the well established rule this Court accepts the findings in which two courts concur unless clear error is shown."

In that case there was conflicting evidence as to intimidation and coercion which this Court said both the District Court and the Circuit Court of Appeals approached and resolved such conflicts as the evidence presented. See also cases cited on pages 31, 32, and 34 of this brief.

Under the rule announced in the above cases Freeman's petition here should be denied.

II.

A reviewing court will not reverse the findings of the Trial Court where that Court, or the Referee has had the opportunity to hear the witnesses and to form an opinion as to their veracity. The judgment of the Trial Court is presumed to be correct. On the same theory this Court will not in such case reverse the reviewing Court.

Referee Hall entered four orders as follows: (1) on May 3, 1954, an order on Freeman to turn over the Marston notes and $887.99 to the receiver (R. 1413); (2) on May 4, 1954, an order dismissing Freeman's original and first and second amended petitions for the adjudication of The Sussin Corporation as a bankrupt (R. 1421); (3) on May 21, 1954, an order directing the receiver to turn back to Borrowdale Brothers a certain truck, trailer, and other personal property (R. 1475); and (4) on June 21, 1954, an order dismissing the petitions of all of the intervening creditors of The Sussin Corporation (R. 1502).

Although many hundred pages of testimony were actually heard before Referee Hall on all of the above questions except as to the reclamation petition of Borrowdale Bros., several hundred pages of testimony had been heard by Referee MacChesney prior to the general reference to Hall on June 4, 1953. See cases cited on pages 31 and 32 as well as under Subdivision III of this brief.

Approximately twelve hundred pages of testimony were taken on what was originally intended to be the receiver's petition for a rule on Freeman to turn over to said receiver the Marston notes and $887.99 in cash. Those hearings, however, were extended by Freeman's then attorney, John O. Wagner, to a hearing on all questions relating to The Sussin Corporation's alleged indebtedness to Freeman for services and money loaned as well as the indebtedness of Freeman to The Sussin Corporation. Over 550 pages of that testimony was given by Freeman alone (R. 393-505, 517-846, 1223-1254).

Freeman's then attorney, John O. Wagner, was given every opportunity to present testimony on every possible issue which he considered material. Both Referee Hall and Judge Barnes devoted a great deal of time to the issues involved as well as to the consideration of the evidence both verbal and documentary. Under the numerous decisions of this and other courts a reviewing court will not reverse the findings of the trial court where that court, or the referee has had the opportunity to hear the witnesses and to form an opinion as to their veracity. Neither will this court reverse a reviewing court where it has affirmed such a judgment.

The judgment of Referee Hall, affirmed by that of Judge Barnes, is definitely presumed to be correct.

In the case of *In re Security Motor Co.*, 51 Fed. (Suppl.) 559 the court said on page 561:

> "Rule 52 of the new Rules of Civil Procedure, 28 USCA following 723C, specifically provides among other things: 'Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a Master to the extent that the Court adopts them, shall be considered as the findings of the Court.' "

In the case of *Commercial Casualty Ins. Co.* v. *Stinson,* 111 Fed. (2) 63 (Certiorari denied, 311 U.S. 667), the Court held that evidence should be construed most favorably to appellee, who is entitled to the full effect of every legitimate inference therefrom, and appellant must fail if reasonable men might differ upon the evidence so considered.

In the case of *Adair* v. *Shallenberger,* 119 Fed. (2) 1017 the Court held that where a trial Court relies upon the rule that a witness, once impeached by incontrovertible evidence, may be disbelieved as to his entire testimony, courts of review will not interfere with the finding of the trial court which had ample opportunity to observe the witnesses and all surrounding circumstances effecting their credibility. See also *National Mut. Casualty Co.* v. *Eisenhower,* 116 Fed. (2) 891, and *LaRue* v. *United Trust Co.,* 181 Fed. (2) 895.

The case of *Parker* v. *Ross,* 234 Fed. 289, (Certiorari denied 242 U.S. 634) involved a suit by a guardian of an incompetent to set aside a contract, alleging unfairness in a fiduciary relationship. The court said on page 291:

> "The master saw and heard the witnesses. If there were reasonable doubts as to the conclusion of fact to be drawn from their testimony we should not overrule his findings. A careful examination of the record satisfies us, however, that his findings were in every essential respect sound."

In the case of *Wetzel* v. *Schaefer,* 124 Fed. (2) 308 (certiorari denied, 316 U.S. 678, rehearing denied 317 U.S. 704), the court said on page 310:

> "It is a well established proposition of law that the findings of the referee, approved by the District Court, unless there appear errors of law, or there is no evidence upon which to base the findings, will not be disturbed. *Reiss* v. *Reardon,* 18 Fed. (2) 200; *In re*

Maki, 18 Fed. (2) 89; *West Kentucky Coal* v. *Dillman,* 15 Fed. (2) 25."

In the case of *In re Rosenburg Trust Co. of Chicago* v. *Murphy et al.,* 138 Fed. (2) 409 (7th Cir.) the Court, citing and following the *Wetzel* case, said on page 409:

> "Since there was a conflict in the testimony on this vital question which went to the existence or non-existence of the equitable lien upon which the appellant relies for recovery, and the trial Court, upon that conflict, resolved against the appellant, *we are powerless to change such finding as we do not weigh the evidence on appeal. In re Gallis et al, Cotsirilos* v. *Klein,* (7th Cir.) 115 Fed. (2) 626, 527; *Wetzel* v. *Schaefer,* (5th Cir.) 124 Fed. (2) 308, 318; *Forbush Co.* v. *Bartley et al.,* (10 Cir.) 78 Fed. (2) 805, 806." (Emphasis ours.)

In view of the above decisions cited under this subdivision alone, the judgment of Referee Hall dismissing Freeman's four petitions for review, sustained by Judge Barnes was properly affirmed by the Court of Appeals.

In the case of *Sampsell* v. *Monell,* 162 Fed. (2) 4, the court held that in a bankruptcy proceeding a reviewing court will not disturb the discretionary determinations of the trial court unless that discretion has been abused.

In the case of *Aetna Ins. Co.* v. *Rhodes,* 170 Fed. (2) 111, the court said on page 115:

> "Error is not to be presumed but must be affirmatively shown. *Morgan* v. *Sun Oil Co.,* 5 Cir. 109 Fed. (2) 178; *Junghaus* v. *Junghaus,* 12 App. D.C. 129, 112 Fed. (2) 212. Every reasonable assumption is required to be indulged in in favor of the judgment. *Boley* v. *Griswold,* 87 U.S. 486; *Frazer* v. *Doing,* 130 Fed. (2) 617; *Hardt* v. *Kirkpatrick,* 9 Cir. 91 Fed. (2) 875."

Freeman's petition here should be denied by this Court.

III.

Freeman's petition for the adjudication of The Sussin Corporation as a bankrupt was properly dismissed for the reason that he did not have a provable claim against said company, "liquidated as to amount and not contingent as to liability."

In view of the evidence in this record Freeman cannot honestly say that he has a provable claim against The Sussin Corporation "liquidated as to amount and not contingent as to liability" as provided in the amendment of Sec. 59 (b) adopted by Congress on July 7, 1952 (p. 456, 82nd Congress, 2nd Session.) Referee Hall found that Freeman had no claim against The Sussin Corporation. Judge Barnes affirmed that finding. The Court of Appeals did likewise.

In the case of *In re Garrett & Co.* (7th Cir.) 134 Fed. (2) 227 the Court sustained an order dismissing an involuntary petition because the claim was not liquidated as to amount. The court said on page 228:

> "The statute was amended in 1938, apparently to prevent certain kinds of creditors from filing involuntary petitions in bankruptcy against others. It limited involuntary petitions by restricting the qualified petitioning creditors to certain designated groups. It lessened the chances of the harassing of debtors by creditors whose claims were neither fixed nor liquidated."

The petitioning creditor there was the sole one and his claim was for over $500.00.

See also the case of *In re Central Ill. Oil & Refining Co.*, 7th Cir. 133 Fed. (2) 657, 660, where a secured creditor filed a petition based on a conditional sales contract but did not release his security.

In the case of *In re The Strathdon, Burrell, et al* v. *Armstrong, et al,* 119 Fed. Supp. 724 the court held that the fact that a claim may be provable in the course of a bankruptcy proceedings does not in itself permit it to be used as the basis for an involuntary petition against a debtor.

That was a case where the creditor claimed to have advanced money on drafts drawn by a corporation of which debtor was an officer and debtor had made no writing obligating himself to the payment of the drafts.

In the case of *O'Leary* v. *Turner,* 209 Fed. (2d) 149 the court held that where the referee found that two out of the three creditors had unliquidated claims, which finding was approved by the district judge, and the petition was dismissed, and there was nothing in the record on appeal to show the nature of the claims the court would presume that the referee and judge based his decision on evidence to support it.

It is entirely clear that, under the evidence in this record and nearly three years of extended litigation, Freeman's claim was in no sense "liquidated as to amount and not contingent as to liability." Freeman merely alleged that he had loaned The Sussin Corporation $11,000.00 and performed services for it in the sum of $2,680.00. Freeman never even attempted to prove *any* services. In fact, on page 4 of his brief he actually concedes that he is not entitled to the $2,680.00. He never proved, upon any theory or for any purpose, that he "advanced" more than $10,683.19 and then he testified that he had used $2,514.00 of that sum for the alleged purchase of the Marston notes.

To shorten this argument reference is made to Subdivision V of this brief where we respectfully urge that Freeman's testimony is shown to be totally impeached and positively worthless in its entirety. It necessarily follows

that his alleged claim amounted to nothing whatsoever. Furthermore his alleged claim did not come within the required rule that it must be *"liquidated as to amount and not contingent as to liability."* Therefore for that reason alone the judgment of the trial court dismissing Freeman's "one man" petition was properly affirmed by the Court of Appeals. For the same reason Freeman's petition here should be denied.

IV.

Where a "one man" petitioner seeking the adjudication of a Corporation as a Bankrupt alleges in his Petition that such Corporation has less than twelve creditors with knowledge that it has more than twelve creditors, the Petition should be dismissed.

Freeman swore in his original and first and second amended petitions, in order to support his "one man" petition for adjudication of The Sussin Corporation as a bankrupt, that it had less than twelve creditors (R. 8-10, 39-41, 50-51. Referee Hall's certificates R. 1508-30, 1531-1538, 1538-45). Undoubtedly his purpose in making that sworn statement was to control the entire proceeding all by himself. He did not want to be bothered by having any intervening petitioners. The undisputed record in this case proves conclusively that Freeman well knew that The Sussin Corporation had at least twenty or thirty creditors. (See pages 2 and 3 of this brief)

Freeman had a desk next to Borrowdale's in The Sussin Corporation's factory. He had access to that company's books, records and files as well as its mail (R. 414, 659, 660, 950, 951). He repeatedly settled claims against The Sussin Corporation for less than 50% against the will of Borrowdale. Freeman well knew that he was not telling

the truth when he swore in his three petitions that The Sussin Corporation had less than twelve creditors. Furthermore, his attorney, Wagner, knew that Freeman was swearing to a falsehood when he swore before that same Wagner as a notary public that that company had less than twelve creditors. Freeman's present able counsel also knew or should have known that Freeman had so sworn when said present counsel argued that The Sussin Corporation had more than thirty creditors (R. 1455).

In the case of *Navison Shoe Co.* v. *Lane Shoe Co.*, 36 Fed. (2) 454, the Lane Shoe Co., as a single petitioning creditor, filed a petition seeking the adjudication of the Navison Shoe Co. as a bankrupt alleging that the latter company had less than twelve creditors. The special Master, to whom the proceeding was referred, found that the Navison Shoe Co. had less than twelve creditors and the District Court affirmed that decision. The Court of Appeals reversed that devision and ordered that the petitioner be dismissed on the ground that the sole petitioner, at the time the petition for adjudication was filed, *well knew that the alleged bankrupt had more than twelve creditors.* The Court of Appeals said on page 459:

> "There is, however, a further ground upon which we think the creditor's petition should be dismissed, and that is that the conclusion to be drawn from the primary facts found by the Master is clear—that the Lane Shoe Co., on November 10, 1928, when it filed the petition in which it alleged that the creditors of the Navison Shoe Co., Inc. were less than twelve, did so *knowing that the allegation was false or did so recklessly, not caring whether the allegation which it affirmed as of its own knowledge to be true, was true*

or false, and, being false, its conduct was a fraudulent attempt to confer jurisdiction on the Court where non existed.'' (Emphasis Ours.)

The court further said on page 459:

"It is incredible that the petitioner did not believe the information that had been given it, or, having such information, did not suspect that what it affirmed in its petition to be true, was false, in which event its conduct would be fraudulent, for one cannot affirm as of his own knowledge a thing to be true, intending it to be relied upon, if he suspects it to be false, without being guilty of fraud. *Shackett* v. *Bickford*, 74 N.H. 57, 65 A 252, 7 LRA (U.S.) 646, 1-24 Am. St. Rep. 933. *A person who suspects his statement is false does not entertain an honest belief it is true, or is consciously and wickedly indifferent to its truth or falsity.''* (Emphasis ours).

The court further held that in determining whether a single creditor can maintain an involuntary petition in bankruptcy based on a jurisdictional allegation, that the number of creditors is less than twelve under Bankruptcy Act, Sec. 59 (d) (e) ii USCA Sec. 95 (d) (e), the number of creditors outstanding at time of filing of the petition is the number to be counted.

The Court of Appeals reversed the order of the District Court and ordered that the petition be dismissed with costs to appellant in both courts.

For the above reason alone, Freeman's three petitions for adjudication of The Sussin Corporation as a bankrupt were properly dismissed at his costs. Freeman therefore stands in this record as one having absolutely no re-

gard for the truth all of which helps to support The Sussin Corporation's claim under Subdivision V of this brief that Freeman's entire testimony on every angle of this case is entitled to no weight whatsoever.

For the same reason Freeman had absolutely no rights in the trial court to object to the dismissal of the intervening petitions which were filed at his solicitation, a portion of them upon his payment to their attorney, Gesas, of $1,200.00 (R. 1248).

For the above reasons Freeman's petition here should be denied.

V.

Where a witness has been impeached as to any material part of his testimony, all of his remaining testimony should be entirely disregarded, except such remaining testimony as has been corroborated by credible testimony or documentary evidence.

Freeman's contradictory statements under oath in his pleadings and while on the witness stand render his entire testimony of no value whatsoever.

Freeman's own checks conclusively show that the total of the checks given for The Sussin Corporation amounted to $9,968.13 (Sussin Corp. Ex. 15, Ex. Vol. p. 112). It was stipulated that the $1,000.00 check given to Borrowdale personally would make $10,968.09 (R. 768-770).

In his verified petition for the appointment of a receiver for The Sussin Corporation, Freeman also claimed the same indebtedness to him on the part of that company (R. 10-11).

The undisputed evidence shows that The Sussin Corporation had over thirty creditors (Sussin Corporation Ex. 5, Ex. Vol. p. 101). See Subdivision IV of this brief.

Freeman had constant access to the books, records and files belonging to The Sussin Corporation (R. 659, 660, 950, 951). He had access to that company's mail (R. 951). He occupied a desk next to that of Borrowdale in The Sussin Corporation's office (R. 659). He was seen going through that desk (R. 950). He used The Sussin Corporation letterheads on which to dictate letters to both Marston and to Diamond Foundry Co. (Sussin Corp's Exs. 18, 19, 21, Ex. Vol. pp. 118, 119, 122, 124) (Rec. Exs. 21-25, 29, Ex. Vol. pp. 20-25, 27; Freeman's Ex. 3, Ex. Vol. p. 35). Freeman was trusted implicitly by Borrowdale. Freeman knew it. The Borrowdale family entertained him in their home. They gave him what he said was his first birthday party.

Freeman swore on the witness stand that he read all of his petitions before he signed and acknowledged same before his attorney as a notary public and that all of said petitions state the truth (R. 618, 619). Freeman's sworn statements in his pleadings differed so materially from his testimony under oath that none of his testimony is entitled to any weight whatsoever, except where his testimony is corroborated by some credible evidence, all of which is entirely lacking. Freeman had no corroboration whatsoever (See foot of page 4 of this brief).

In his said four petitions Freeman swore that The Sussin Corporation had debts in the sum of $15,000.00 and that it had assets worth $5,000.00 (R. 8-10, 39-41, 50-51). The undisputed evidence in this case clearly shows that The Sussin Corporation owes approximately $46,000.00

(Sussin Corp. Ex. 5, Ex. Vol. p. 101) and that it had, on February 20, 1953, assets worth $150,000.00.

In Freeman's verified answer to the receiver's petition for a rule on him to turn over certain Marston notes and $887.99, he swore that he loaned Marston & Co. the money with which to buy the camera for which those notes were given as part payment (R. 64-65) (Rec. Exs. 2, 4, Ex. Vol. p. 3, 5).

On the contrary, Freeman testified positively that he purchased the Marston notes from The Sussin Corporation by using certain portions of the cash which he swore in his four petitions that he had loaned to it (Freeman's Exs. 48-49, Ex. Vol. p. 81-82). On that theory alone he was testifying falsely either as to his alleged loan or as to the purchase of the Marston notes. Obviously he could not use the same funds for both purposes. Neither could he use the money for a loan to The Sussin Corporation when it was actually advanced as part of the down payment of $20,000.00 on the six cameras.

Borrowdale testified at length that Freeman agreed with The Sussin Corporation to purchase six cameras and to make a down payment thereon of $20,000.00 (R. 228-230). The Sussin Corporation acknowledged the above order by letter on or about June 14, 1952. *Freeman himself introduced that letter as his own exhibit* (Freeman Ex. 6, p. 40). He, therefore, cannot impeach his own exhibit.

Borrowdale's testimony that Freeman agreed to buy six cameras from The Sussin Corporation and to make a down payment of $20,000.00 thereon, is clearly and definitely corroborated by five witnesses. See page 4 of

this brief. Freeman wrote the Diamond Foundry stating that if the first six sets of castings were satisfactory another six would be ordered soon (Sussin Corporation's Exs. 20, 21, Ex. Vol. pp. 122, 124). Reference is made to The Sussin Corporation's Exs. 17, 20, 21 Ex. Vol. pp. 117, 123, 124. See also alleged bankrupt's Exs. 18 and 19, Ex. Vol. pp. 118, 119 (Freeman's letters to Diamond Foundry on The Sussin Corporation letterheads).

Freeman must have recognized that The Sussin Corporation owned the Marston notes because in the letter to Orr dated June 20, 1952, *he signed Sussin Corporation by C. E. Freeman and said* "We are enclosing conditional sale agreement and twelve notes covering balance due on the Sussin camera installed in your plant" * * * "Please return the papers to us" (not me) "promptly so we" (not I) "can discount the notes for *we*" (not I) "can use the money." (Rec. Ex. 30, p. 28). There is nothing in that letter to indicate that Freeman then owned or had possession of any notes signed by Marston.

In none of the letters to Orco Cameras, Inc. (not Marston) did Freeman ever mention that he owned the Marston notes. All of his letters were written in the name of The Sussin Corporation with the initials C. E. F. or F. All of the letters used the words "we" or "us", not "I". (Rec. Exs. 21-25, 29, p. 20-24, 27, 28, 29, 30, Ex. Vol. pp. 20-31).

Freeman's own exhibit (Ex. 2, Ex. Vol. p. 34), a letter from Marston to The Sussin Corporation, clearly shows that eleven notes were sent to that company on July 10, 1952, together with the conditional sales contract and a check for $442.20 to cover Note No. 1 (Freeman's Ex. 2,

Ex. Vol. p. 34). Freeman must have taken several letters from The Sussin Corporation's mail.

The following are a few of the inconsistencies in Freeman's testimony:

Freeman testified that he did not sell the camera to Precision or Marston (R. 684, 748, 749). He claimed that he sold the camera to Marston "in a way." (R. 683). He testified that the $11,000.00 loaned to The Sussin Corporation was made up of $8,500.00 in checks and $2,500.00 to buy the Marston notes (R. 721). He testified that the $350.00 check to American Photo Bulletin was paid on the notes although the check was not written until some two months after the Marston camera was delivered (R. 737).

Freeman admits loaning money in April to make six cameras at once (R. 600-601). "I was ordering six sets of castings." "We ordered other parts from other people." (R. 602). He testified that all of his checks that he had ever given to The Sussin Corporation or for its benefit were listed in Sussin Corporation's Ex. 15 (Ex. Vol. p. 112). He testified that the $3,131.20 alleged commission on the Marston deal was included in his original petition filed by him (R. 731). Finally he concedes that he was not entitled to a commission on any deal, that it might be better called a bonus. (R. 744, 745, 747).

Freeman's Exs. 48 and 49 are in his handwriting (Ex. Vol. pp. 81-82). He admits that his Ex. 49 was not correct (R. 723-724). He testified that The Sussin Corporation and he had started to do business under the name Sussin Sales Co. (R. 706) *and that he himself was the Sussin Sales Co.* (R. 707, Rec. Ex. 11, Ex. Vol. p. 12). He testi-

fied that he organized the Sussin Sales Co. to connect up with The Sussin Corporation's name (R. 708). Borrowdale gave him that permission when he and Borrowdale were alone. *He testified that he swore that he loaned Marston money but that the only way he loaned it was buying Marston notes from The Sussin Corporation. He further testified that he never loaned Marston money directly* (R. 721).

Freeman testified that his Ex. 49 says that his 40% commission was on the total selling price of the Marston camera, $10,683.00 (R. 722). Again he testified that his net figure for the sale of the Marston camera was $2,030.75 (R. 715). Borrowdale and he were alone when this was figured. And again he testified that $4,273.20 was his commission on the whole deal. Borrowdale and he were alone. He testified that he had a Marston check for $500.00 in his pocket when he went to New York to deliver the camera and gave it back to Borrowdale when they returned to Chicago (R. 719).

In answer to a question as to where the money came from to buy the notes, Freeman answered, "I am pretty well supplied with money" (R. 773). He testified that his contract with The Sussin Corporation was oral. It was made on a handshake. He never asked for a written contract regarding his commission. (R. 685, 686). No one was present when the contract was made (R. 686). He testified that he had never sold a camera on commission and he did not know what a fair commission was (R. 706). He claimed his commission on the Marston deal was $3,030.00 net to him (R. 703), and again he claimed a commission on the camera taken in exchange for the sum of $2,542.00 (R. 705).

Again Freeman testified that he used the checks for $1,500.00, $664.00 and $350.00 together with $3,031.37 to make up the $5,541.00 for the purchase of the Marston notes (R. 636, 637). At one time he denies ever having seen witness Srnec (R. 604). At another time he admits seeing Srnec with Borrowdale at which time he said "hello" (R. 615-617). He said he never talked to Pabst, Borrowdale's attorney (R. 610, 613). He testified that he was charging 40% commission on the entire Marston deal of $10,683.00 even though $2,400.00 was allowed for a camera taken in exchange and 15% was allowed to Orr (R. 710).

Freeman testified that he figured 40% on the entire purchase price of $10,683.00 for the Marston camera (R. 713). He testified that he did not have the scratch of a pen to show his contract for 40% commission. He told what he did to earn the commission (R. 697). His talks re the 40% commission were always with Borrowdale alone (R. 699). At one time he stated he did not know that a commission was paid to Orr on the Marston deal. At another time he stated that he charged only 25% commission rather than 40% by reason of the payment of 15% commission to Orr (R. 700).

Freeman testified that his commission on the Marston sale amounted to $3,000.00 and $2,600.00 on the Precision sale (R. 685). He admitted the $1,500.00 check which he stated was given for part payment of the Marston notes was made before the notes were given. Same applies to the checks for $350.00 and $644.00. He claimed to be an expert accountant (R. 750) and that the figures on The Sussin Corporation's Ex. 15 (Ex. Vol. p. 112) are his own (R. 751). He could not make any comparison of The Sus-

sin Corporation's Ex. 15 with his own Exs. 48 and 49 (R. 754).

Freeman attempted to explain his commission (R. 761). *He actually testified that his original petition for adjudication was not correct* (R. 761).

The case of *Mann* v. *Arkansas Valley Land and Cattle Co.*, 24 Fed. 261, 267, involved a suit with reference to cattle with numerous witnesses and some false testimony. The court instructed the jury that

> "* * * if you find that any of these witnesses whose testimony has been contradicted, or seems to be inconsistent, the several parts with the other, has wilfully sworn falsely in respect to any material matter, then you are at liberty to disregard the testimony of such witness altogether. * * * That is the law in such matters,—that if a witness wilfully, purposely, knowingly testified falsely he may be discredited altogether." Affirmed in 130 U.S. 69.

The case of *Wellman* v. *U. S.*, 297 Fed. 925, involved the charge of forgery. The court said on page 929:

> "The truth of each and every uncorroborated statement made by Wellman must be determined by the jury in connection with all his testimony. If the jury believed that he was knowingly and wilfully testifying falsely in other material respects, they had a right to disbelieve him in this particular."

The case of *Norfolk & W. Ry. Co.* v. *McKenzie*, 116 Fed. (2) 632, 635 involved a jury trial in a personal injury suit. The Court said on page 635:

> "The jury may disregard the evidence altogether and should do so if the witness has willfully sworn

falsely to a material fact in the case, but they may not be required to do so by the Court."

The court there says that there is no positive rule of law which excludes such evidence, but says

"Such disregard of his oath is enough to justify the belief that the witness is capable of falsification on all matters about which he testifies."

Encyclopedia of Federal Procedure 3rd Ed. Vol. 8 Sec. 26.113 states as follows on page 138:

"According to the familiar maxim *falsus in uno, falsus in omnibus,* all testimony given by a witness may be disregarded or rejected, even though corroborated (*Shecil* v. *U.S.,* 226 Fed. 184)—where it is false as to a material fact with respect to which the witness could not have been mistaken and must have falsified intentionally or willfully thereby showing himself unworthy of credit. *Tracy* v. *Town of Phelp,* 22 Fed. 634, *Emanuel* v. *Kansas City Title & Trust Co.,* 124 Fed. (2) 175, 180 F. 317, 106 F. 428 (affd. 114 Fed. 705) (Certiorari denied 191 U.S. 525)".

In the case of *Parker* v. *Ross,* 234 Fed. 289 the Court said on page 292:

"Moreover the matter would have been fully justified in completely disregarding the uncorroborated evidence of this witness in view of his palpably false and evasive testimony respecting his knowledge of his disbarment."

A petition for a writ of certiorari was denied in 242 U.S. 634.

In the case of *Hadley* v. *White,* 367 Ill. 406, the court said on page 412:

> "As this court has frequently pointed out the testimony of a witness may contain, within itself, its own impeachment, and he may be contradicted by what he states as well as by adverse testimony, and there may be so many omissions, discrepancies and improbabilities in his testimony as to justify a court or jury in disregarding it in its entirety. (***Mannen*** **v.** ***Norris,*** 338 Ill. 322; *Kuehne* v. *Malach,* 286 *id.* 120; ***Kelly*** v. ***Jones,*** 290 *id.* 375; *People* v. *Bentley,* 357 *id.* 82.) In *Kennard* v. *Curran,* 239 Ill. 122, which was an action to set aside a deed in fraud of creditors we said: 'The fact that he stated he did not intend to defraud creditors, even though he may not be contradicted by any direct testimony, did not bind the court to believe him, if from the other evidence or from the inherent improbability or contradictions in the testimony the court was satisfied of the falsity of the statements. (*Larson* v. *Glos,* 235 Ill. 584; *Podolski* v. *Stone,* 186 *id.* 540.)' "

In the case of *Thompson* v. *Northern Hotel Co.,* 256 Ill. 77, the court approved on page 87 an instruction properly authorizing the jury to disregard the uncorroborated testimony of any witness who they believed had willfully and knowingly sworn falsely to any material matter then the jury might disregard all of the evidence of such witness except in so far, if at all, as the evidence of such witness is corroborated by other credible evidence or by facts and circumstances appearing from the evidence.

It is therefore clear that Freeman's testimony was definitely impeached in many instances. It necessarily follows that none of his testimony is entitled to any weight

whatsoever. He was not, and could not be, corroborated in any particular by reason of the fact that in practically every instance he testified that all of his conversations were with Borrowdale alone, always alone. (R. 438, 445, 451, 462, 483, 485, 1228-9, 1232 and many others).

Freeman undoubtedly thought that if he always testified that his conversations were with Borrowdale alone he would be much more successful in his litigation. Such is not the case.

ANSWERING FREEMAN'S REASONS FOR THE ALLOWANCE OF THE WRIT.

On page 20 Freeman admits that Referee Hall found that he did not have and never had any right title or interest in the Marston Notes (R. 1414). On this issue, then, Freeman admits that Referee Hall's finding rested solely on a question of fact found in The Sussin Corporation's favor by Referee Hall and Judge Barnes and affirmed by the Court of Appeals.

On pages 20 to 24 Freeman sets forth his reasons for the allowance of a Writ of Certiorari here. Freeman admits that Judge Finnegan wrote the opinion but states that neither Chief Judge Duffy or Judge Swaim joined in the opinion. Freeman is confused. See pages 1a to 5a where all three judges states that the judgment appealed from is affirmed. It is entirely clear from their opinion that Chief Judge Duffy, Judge Finnegan and Judge Swaim read the record. All three judges joined in affirming the judgment of the District Court all of which they were bound to do pursuant to the many previous opinions of that Court, as well as those of this Court.

Counsel for Freeman should be ashamed of his discourteous and unprofessional criticism of the judges of the Court of Appeals as set forth on pages 20 to 26.

Freeman intimates in the last paragraph on page 22 that he *compiled and paid for* the 1616 page record. Freeman well knows and his present counsel knows that that statement is absolutely false. He knows that his former counsel (John O. Wagner) retired from the case because his fees were not paid (R. 1387, 1389). Counsel knows that Wagner had possession of Freeman's transcript of the record, claimed an attorney's lien thereon and refused to deliver it to Freeman. See Freeman's petition for review of Referee Hall's order (R. 1495). Counsel also knows that Harry C. Kinne, the undersigned (Sussin Corp.'s attorney) delivered that company's copy of the transcript to Referee Hall without charging a penny to Freeman. As far as the undersigned knows, Freeman has never paid his former attorney (Wagner) and still does not have any portion of the transcript of the evidence in this case. Undoubtedly that is one reason at least why Freeman failed to bring to the Court of Appeals and to this Court the extensive transcript of the record before Referee MacChesney on the question of the ownership of the Borrowdale Bros.' truck and trailer. See pages 5 and 6 of this brief.

The case of *U. S.* v. *Oregon State Medical Society et al.*, cited by Freeman on page 22, arose out of a suit by the U. S. to restrain alleged violations of Sections 1 and 2 of the Sherman Anti-trust Act. The District Court, after a long trial, dismissed the complaint on the ground that the Government had failed to prove its charges, 95 Suppl.

103. The United States appealed directly to this Court. This Court said on page 330:

> "The record is long, replete with conflict in testimony and includes quantities of documentary material taken from the appellee's files and letters written by doctors, employers and employees."

This Court further said on page 332:

> "We are asked in substance to try the case *de novo* on the record, make findings, and determine the nature and form of relief. We have heretofore declined to give such a scope to our review. *U. S.* v. *Yellow Cab Co.*, 338 U.S. 338."

This Court, quoting from *U. S.* v. *U. S. Gypsum Co.*, 333 U.S. 364, 395, (also cited by Freeman on page 22) further said on page 339:

> "A finding is clearly 'erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." The Government's contentions have been plausibly and earnestly argued but the record does not leave us with any definite and firm conviction that a mistake has been committed. "As was aptly stated by the New York Court of Appeals, although in a case of a rather different substantive nature: 'Face to face with living witnesses the original trier of the facts holds a position of advantage from which appellate judges are excluded. In doubtful cases the exercise of observation often proves the most accurate method of ascertaining the truth. * * * How can we say the judge is wrong? We never saw the witnesses. To the sophistication and sagacity of the trial judge the law confides the duty of appraisal. *Boyd* v. *Boyd*, 252 N.Y. 422, 429, 169 N.E. 632, 634.' " The judgment of the District Court was affirmed.

Neither case aids Freeman in any way. In fact it is not clear why he cited them.

Freeman is again in error in stating that just because he claimed in the Court of Appeals that the findings of fact

of the trial court are clearly erroneous that reviewing court *must* examine the entire record. Neither of the above cases so holds.

In the case of *D.M.W. Contracting Co.* v. *Stolz,* 158 Fed. (2) 405, (cert. denied 330, U.S. 839), cited by Freeman on pages 22 and 34, the Court said on page 407:

> "It appears from the foregoing that it is the trial court in such a case who makes the final determination of all of the issues. The report of the master is advisory only and is without effect until confirmed by the court. For while he is charged with accepting the master's findings of fact unless clearly erroneous, it is necessary for him to review the transcript of proceedings to determine if such error has been made, and when objection is taken to the report, as was done here, he is bound to review the transcript of proceedings, exhibits and Exhibits to determine for himself whether the master's report should be accepted, rejected wholly or partly, modified, recommitted with instructions, or whether he should receive further evidence."

Judge Barnes followed that rule. His judgment was affirmed. Counsel is mistaken in stating that the above *United States Gypsum* and *Bogardus* cases aid Freeman in any way here.

In the case of *Sapero* v. *State Board of Medical Examiners,* 90 Colorado 568, the State board of medical examiners, upon notice and a hearing, revoked the license of Sapero to practice medicine. The district court upheld the medical board. Sapero sued out a writ of error.

The question was as to the power of a Medical Board and the finality of its findings.

The court said on page 577:

> "The findings of a Medical Board are persuasive, but not conclusive."

The court held that there must be a breach of the law, not merely a breach of professional ethics or the rules of

the board. The quotation by Freeman from the *Sapero* case on page 22 is ridiculous, to say the least. It has no application to the case at bar.

In the case of *Bishop* v. *U. S.*, 223 Fed. (2) 582, the court said on page 587:

> "A trial judge is not supposed to recite the evidence upon which he bases a finding, and the validity of his finding does not depend upon what an appellate court thinks he had in mind at the moment; he is presumed to have had the whole record in mind."

In the case of *Besser Mfg. Co.* v. *U. S.*, 343 U.S. 444, this Court said on page 448:

> "Appellants' argument fails on two counts. First, it necessarily attacks the sufficiency of the evidentiary material considered in arriving at the royalties finally established. We do not pass upon matters of that character in the absence of glaring error not shown here."

In the case of *Brown* v. *Allen*, 344 U.S. 443, this court said on pages 535-536:

> "the findings of fact on a trial are to be accepted by an Appellate Court in the absence of a clear showing of error. The trial court, seeing the demeanor of witnesses, hearing the parties, giving to each case far more time than an appellate court can give, is in a better position to unravel disputes of fact than is an appellate court on a printed transcript."

Freeman's comments on page 23 with reference to the opinion of the Court of Appeals in this case are positively ridiculous. It is clear that his counsel has not even taken the trouble to carefully read that opinion.

The following are a couple of examples of the utter confusion in which Freeman's present counsel finds himself.

At the hearing on Freeman's objections to the dismissal of Freeman's petition for adjudication, (R. 1466) during

the discussion as to whether Freeman would turn over the Marston Notes and cash to the receiver, Freeman's present counsel said:

> "I am mad, and in addition to being mad I have another ground for not doing it. One of the grounds for seeking review is that the Court did not have jurisdiction. If I turned over the notes to the clerk of the District Court, I might be waiving an important point I could not take advantage of. *They are in my safe.*" (Emphasis ours)

Freeman's present counsel said before Referee Hall:

> *"I have made, apparently some statements, which were not correct, not intentionally." "I am confused in my own mind."* (R. 1462, 3) "I want to clear up the case I cited. If it does not stand for what I said to the Court, I will fly out the window and land on the floor above" (not below) (R. 1464) (Emphasis ours).

Freeman's present counsel is still confused in that he cannot recall his own language with reference to his own agreement as to the purport of Referee Hall's order of October 8, 1954 (R. 1580-1). He entirely fails or absolutely refuses to read the numerous decisions of the Court of Appeals and of this Court. It has been held time and again that neither the Court of Appeals nor this Court will take jurisdiction of a case where the decision of the trial court is based upon a question of fact. Judge Finnegan and his associates declined to do just exactly what this Court has many times declined to do, namely to reweigh the evidence and evaluate the credibility of the witnesses. Referee Hall and Judge Barnes in the trial court did that very thing.

On pages 24 to 27 counsel for Freeman is still confused with reference to the evidence as to whether Freeman bought the Marston notes from The Sussin Corporation. Freeman swore in his answer to the receiver's turn-over

petition that he *loaned Marston the money* to buy the notes (R. 64-65, 618, 619). He testified that he bought the notes from The Sussin Corporation (Freeman's Exs. 48-49 Ex. Vol. 81-82). The notes were payable to The Sussin Corporation (Rec. Exs. 17, 18, 19, 29-37, Ex. Vol. 18, 29-31). Freeman had no money to buy the notes if he loaned The Sussin Corporation $11,000.00 as he swore in his four petitions that he did. He used all of the money (which it was stipulated that he advanced) as a down payment on six cameras. He therefore had no money with which to buy the Marston notes. Orr, president of Marston and Company, denied that Freeman ever loaned them anything. It should be remembered that Borrowdale and five witnesses testified that Freeman did buy the six cameras from The Sussin Corporation with a down payment of $20,000.00. (See page 4 of this brief).

Freeman devotes nearly all of page 24 to a discussion of whether Borrowdale put the notes in one drawer or another drawer of his desk, entirely overlooking the fact that Freeman was not corroborated by a single witness. On pages 24 to 27 Freeman discusses nothing except questions of fact all of which where decided in The Sussin Corporation's favor by Referee Hall and Judge Barnes whose judgment was unanimously affirmed by the judges of the Court of Appeals. Counsel for Freeman is still confused in refusing to understand that this Court will not review questions of fact.

We repeat that Freeman stealthily concedes that at all of his conversations with Borrowdale, president of The Sussin Corporation, no one else was present. Therefore, Freeman has no one to corroborate his testimony. Borrowdale has five witnesses who corroborate his testimony as to Freeman's purchase of six cameras. (See page 4 of this brief).

In view of this entire record counsel for Freeman is entirely confused as to who has committed perjury. It is clear that Freeman himself is the perjurer. Freeman testified that he was The Sussin Sales Co. (R. 708). He so stated in an affidavit given the Northern Trust Co. (Rec. Ex. 11, Ex. Vol. 12). Freeman obtained possession of two Marston checks payable to The Sussin Corporation and endorsed and cashed them, not in his own name but in the name of The Sussin Corporation. The Northern Trust Co. objected to Freeman endorsing those checks as Sussin Co. Freeman added the letters "rp" to the endorsements and gave the bank his affidavit stating that he had authority to do so. (Rec. Exs. 2, 4 and 11, Ex. Vol. p. 3, 5, 12).

Freeman's argument on page 27 is entirely unimportant for the reason that Referee Hall did not pass on the question of Freeman's indebtedness to The Sussin Corporation for moving expenses. (R. 1537)

Freeman's argument on page 28 where he cites the case of *Borrowdale* v. *Sugarman* is merely a vicious attempt to bring in questions which are entirely outside of this record and have absolutely no bearing on this case. On page 28 counsel attempts to explain Freeman's false statements in his pleadings by calling them "inartful" and stating that Freeman did not appreciate the legal aspects.

The questions raised on page 29 as to whether Freeman's contract was definite is an after-thought. Freeman himself testified that *he was the Sussin Sales Co.* (R. 708). He so stated in an affidavit furnished to the Northern Trust Co. (Rec. Ex. 11, Ex. Vol. p. 12). If Freeman desired to raise a question of law at any time he should have done so in the trial court to enable that court to first pass upon the question.

In the case of *In re Simon,* 216 F. 2nd 339 (7th Circuit) (cert. denied 348 U.S. 964) cited by Freeman in the Court

of Appeals that Court held that where a legal question was not raised in the trial court it could not be raised on appeal. Freeman not only agreed to purchase six cameras but he immediately bought parts in the form of six castings of the Diamond Foundry for those cameras. He furthermore notified that Foundry that if it did a good job on the six sets of castings more would be ordered. (Sussin Ex. 20, 21, Ex. Vol. p. 122, 124). His contract was partially performed.

On page 29 Freeman cites the case of *Quong Ting* v. *U. S.*, 140 US 417, 420-1, in support of his contention that Borrowdale was so hopelessly discredited and impeached that his case was utterly destroyed. This rule applies with particular force to Freeman. The Referee had the opportunity to observe both Borrowdale and Freeman. He indicated clearly by his reports to the trial court that he believed Borrowdale and that he did not believe Freeman. Furthermore, Freeman's testimony was not corroborated by a single witness as to the important question of the purchase by him from The Sussin Corporation of six cameras while Borrowdale's testimony was corroborated by five witnesses. (See page 4 of this brief).

In the *Quong Ting* case, the question arose as to the credibility of a Chinese boy sixteen years of age arriving on a U. S. steamer and claiming that he was born in the United States and that he lived here until he was ten years of age. He could speak no English and knew nothing about the city. This court held that it was evident that he was coached, that his testimony was improbable and that the court would not believe the boy's testimony even though there was no contradictory evidence. There was no corroborating evidence except that of the boy's father. Borrowdale was corroborated by five witnesses.

Freeman's statement in the last paragraph of page 29 that the "redolence of his (Borrowdale's) testimony was intolerable even to counsel for Sussin who was *'required'* in his brief below to concede in a guarded way that Borrowdale's testimony was not worthy of belief" is another false and vicious statement as is plainly shown by reference to the foot of page 29 of Freeman's brief.

The intervening creditors became sadly aware of Freeman's perfidy and readiness to tell any sort of a story which appeared convenient to him from time to time. Even though they had elected to continue the proceedings, Freeman's *petition was dismissed* because he falsely swore that (1) The Sussin Corporation had less than twelve creditors; (2) he had a claim against The Sussin Corporation *liquidated as to amount and not contingent as to liability;* (3) he had loaned that company $11,000.00; and (4) he had performed services of the value of $2,680.00 which he now concedes on page 4 of his brief was not the truth. He so stated in his brief in the Court of Appeals. On page 30 Freeman attacks his first counsel (John O. Wagner, whom he did not pay). Counsel for Freeman mentions "an internecine enmity" between Attorney Wagner and the undersigned. Counsel does not deign to mention how, at his request and for various reasons the undersigned and Mr. Morrison, attorney for the receiver, agreed to some ten extensions of time for printing Freeman's record and brief in the Court of Appeals and to two extensions in this Court. The undersigned is possibly becoming more cooperative as he grows older.

The District Court had good reason to rely on the decisions of Referee Hall. The Court of Appeals had reason to do the same.

This Court has held in many cases that it will not go into a question of fact where a Referee's findings of fact

have been affirmed by the trial judge and where the Court of Appeals has affirmed the judgment of the lower court.

At the foot of page 30 and top of page 31, Freeman contends that when the Referee and the trial court found that The Sussin Corporation was not indebted to Freeman because he had purchased six cameras from that company with a down payment of $20,000.00 thereon, said Referee and trial court passed upon a question of law. Freeman raised no question of law whatsoever in the trial court. In every instance he argued that he, rather than Borrowdale and his five corroborating witnesses, were telling the truth. Freeman made the same argument in the Court of Appeals as he makes here in this Court.

In a note at the foot of page 31 Freeman states that The Sussin Corporation discussed for the first time in the Court of Appeals the question as to whether Freeman had raised the legal question as to the validity of the contract for the purchase of six cameras. We repeat that Freeman himself raised this question for the first time in the Court of Appeals. We fail to see how he now can carry out his threat that if this question is argued here and if his statement is challenged by The Sussin Corporation he will print for this Court his argument before the District Court. For some reason Freeman has omitted from the printed record in the Court of Appeals as well as the printed record before this Court his own argument before Judge Barnes in the trial court. We repeat that in Freeman's own petition for review he claimed that Referee Hall's reports were against the weight of the evidence. (R. 1475, 1481, 1484, 1503).

The case of *Hausman* v. *N. P. Severin Co.*, 316 Ill. App. 585, cited on page 31, avails Freeman nothing. That court did say on page 589:

> "To constitute a binding contract the minds of the parties must meet upon the essential terms."

In that case it is clear that no contract was to be made until plaintiff and defendant had agreed on a written contract. The court further said on page 590:

> "We have carefully read the testimony and the exhibits, and are of the opinion that the trial judge decided the case correctly. It is manifest that it was the intention of both parties that a written and signed contract be entered into between them. The expenses incurred by the plaintiff while it was negotiating for a contract are not recoverable."

The judgment of the trial court was affirmed.

In the case of *Obartuch* v. *Security Mutual Life Ins. Co.*, 114 F. (2) 873, plaintiff, the widow of the insured, sued upon an insurance policy issued by defendant upon the deceased husband's life. The insurance company claimed that there was no meeting of the minds. The court entered judgment for defendant. Mrs. Obartuch appealed. The reviewing court affirmed. The trial court found as a fact that the insured never intended to make application for the issuance of the policies.

There is no dispute as to the language of the parties as Freeman contends on page 32. Borrowdale and The Sussin Corporation's five witnesses testified that Freeman agreed to buy six cameras. Freeman contends that he did not so agree. Referee Hall definitely found that Freeman did so agree and dismissed Freeman's petition on several grounds. Judge Barnes affirmed that finding. Judges Finnegan, Duffy and Swaim affirmed the judgment of the District Court. We repeat that Freeman raised no question of law before Referee Hall or Judge Barnes.

Freeman complains that Referee Hall found that the contract for the purchase of six cameras was "evidenced by a writing" namely the Diamond Foundry Contract which Freeman himself signed (R. 1528. Freeman's Ex. 10, Ex.

Vol. page 44, R. 507-8). Referee Hall merely found that that contract was some evidence of Freeman's agreement with Sussin Corporation. Five witnesses corroborated Borrowdale as to Freeman's verbal contract.

The cases of *Higbie* v. *Rust* and *Bertlee Co.* v. *Ill. Publishing and Printing Co.*, cited on page 32 and the case of *Telluride Power Co.* v. *Crave Co.*, cited on page 33 were cited by Freeman for the *first time* on pages 2 and 3 of his petition for rehearing in the Court of Appeals, which petition for rehearing was denied.

The *Higbie* and *Bertlee* cases were jury cases. The *Telluride Power Company* case cited on page 33 involved the question as to whether a long series of letters constituted the entire contract there. There is no such question here.

On page 33 Freeman complains that Referee Hall's orders of May 21, 1954, and June 21, 1954, respectively, turning over to Borrowdale Brothers certain truck, trailer and other personal property without supporting evidence (R. 1475) and dismissing the intervening petitions (R. 1502) involved questions of law.

Reference is made to Freeman's note at the foot of page 6 of his brief where he himself states that the question as to the ownership of the truck and trailer was tried before Referee MacChesney and submitted on briefs before this entire case was referred to Referee Hall. Freeman did not see fit to bring that evidence to the Court of Appeals or to this Court. Neither did he or the receiver see fit to introduce any evidence whatsoever in support of their contention that the receiver had any right, title or interest in the personal property in question.

In the case of *Aetna Insurance Company* v. *Rhodes,* 170 Fed. (2) 111, the Court said on page 115:

> "Where the evidence is not a part of the record it will be presumed that it supports the jury's verdict and the Court's judgment."

In the *Aetna* case the Court cited and followed many of its former decisions, as well as the decision of this Court in the case of *Zimmerman* v. *Harding,* 227 U.S. 489, 33 S. Ct. 387, 57 L. Ed. 608.

The entire record before Referee MacChesney was available to both Referee Hall and Judge Barnes. Furthermore, Freeman's present able Counsel agreed to have all property turned over by the Receiver to The Sussin Corporation and Borrowdale Brothers in order that the amount of Freeman's supersedeas bond might be fixed at as low a figure as possible.

It is entirely clear that Freeman's statement on page 33 that he was not given an opportunity to defend against Borrowdale Brothers' petition for the return of their property is absolutely untrue, particularly in view of his own statement at the foot of page 6 of his brief and his Counsel's statement to Referee Hall at the time of the entry of the order (R. 1471, 1472, 1473).

It is optional with the intervening creditors as to whether they will continue with a "one man" petitioner in seeking the adjudication of a corporation as a bankrupt.

In the case of *In re Heffron,* Fed. case No. 6321 (D.C. Ill.) originally cited by Freeman in the Court of Appeals the Court held that any creditor who has been misled by false representations should not be prevented from withdrawing on the discovery of the truth if the court is satisfied that he was so misled.

On page 34 Freeman is entirely confused in arguing that the rule announced in the case of *D. M. W. Contracting Co.* v. *Stolz,* 158 Fed. (2) 405, 407, that in no instance is a district judge bound by the Master's or Referee's conclusions of law applies to courts of appeal where the findings of the Master or Referee have been approved by the trial court. The cases of *U. S.* v. *U. S. Gypsum Co.,* 333 U.S. 364, 396, and *Bogardus* v. *Commissioner of Internal Revenue,* 302 U.S. 34, 39, are not in point here for the reason that they involve appeals from decisions of the Board of Tax Appeals, which decisions are subject to judicial review. Counsel for Freeman is again confused in attempting to decide what Congress had in mind in passing Bankruptcy General Order 47 or Federal Rule 52 (a), both of which definitely hold that the finding of the trial court approving the findings of the master or referee are final unless there appears to be some definite mistake.

In answer to Freeman's contention on page 34 that the agreement to purchase and sell six cameras was between The Sussin Corporation and a partnership reference is made to Freeman's own testimony denying that he and Russell W. Borrowdale, Sr., were partners. In fact, Freeman himself testified positively *that he was the Sussin Sales Company.* See also his affidavit furnished to the Northern Trust Company to induce that bank to accept his endorsement on the Marston checks payable to The Sussin Corporation. (R. 708; Rec. Ex. 11, Ex. Vol. p. 12).

The question of the alleged purchase of the Marston notes by Freeman discussed on page 35 is a clear question of fact. Freeman raised no question of law in the trial court. The notes were payable to The Sussin Corporation and not to Freeman. The notes were never endorsed by The Sussin Corporation. Orr, President of Marston and Company, testified that he had no dealings whatsoever with

Freeman with reference to the purchase by Marston and Company of the cameras from The Sussin Corporation. We repeat that Freeman swore in his answer to the receiver's turn-over petition that he loaned the money to Marston and Company to purchase the cameras. On the witness stand Freeman testified that he bought the notes from The Sussin Corporation. No corroborating evidence was introduced by Freeman.

On page 35 Freeman refers again to the stipulation of all parties that his total advancements to The Sussin Corporation amounted to $10,968.09 (R. 768). That sum amounted to $31.91 less than the $11,000.00 which he swore in his four verified petitions he had loaned to The Sussin Corporation. In order to sustain his claim that he bought the Marston Notes from that company he was obliged to and did testify that he used $2,514.00 of the $10,968.09 to buy those notes. (See Freeman's brief page 10). Freeman's purchase of the six cameras with a down payment of $20,000.00 left him owing The Sussin Corporation at least $9,000.00 with nothing to apply on the purchase of the Marston notes. Freeman admits on page 4 of his brief that his sworn statement in his four petitions for adjudication that he performed services for The Sussin Corporation worth $2,680.00, was not true.

Freeman's statement at the foot of page 35 and the top of page 36 as to his present position and liability is the result of his own unlawful and ruthless attempt throughout proceedings in three courts to wreck The Sussin Corporation and Borrowdale Brothers. There is no irony whatsoever as to the situation in which Freeman deservedly finds himself. Freeman departs from the record to state that he has the additional prospect of suits being filed against him. No suits have been filed. The Sussin Cor-

poration stands ready to freely comply with its agreement to sell him six cameras. In answer to Freeman's inquiry as to the amount to be still paid for those six cameras The Sussin Corporation courteously states that it is the difference between $20,000.00 and $10,968.09 already advanced him on said $20,000.00.

For the many reasons herein set forth Freeman's petition for a Writ of Certiorari should be denied.

Respectfully submitted,

HARRY C. KINNE,
Counsel for Respondent The Sussin Corporation, alleged bankrupt.

MAR 1 1956
HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

FEBRUARY TERM, 1956.

No. 666

CARL E. FREEMAN,

Petitioner,

vs.

THE SUSSIN CORPORATION, a Corporation, Alleged Bankrupt, and
RICHARD REX PARKIN, Receiver,

Respondents.

BRIEF OF RECEIVER RICHARD REX PARKIN IN OPPOSITION TO CARL E. FREEMAN'S PETITION FOR CERTIORARI.

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INDEX.

PAGE

The Issues and the Evidence 1

Reasons for Denying the Writ 3

Citations.

CASES:

Hadley v. White, 367 Ill. 406 3

Locomotive Engineers Mutual Life & Accident Insurance Assn. v. Laurent (C.C.A. 7), 172 F. (2d) 889, 4

N. & W. Railway Co. v. McKenzie, 116 F. 2d 632 3

U. S. v. Johnston, 268 U.S. 220 4

STATUTES AND RULES:

Rule 19, Sec. 1 (b) Sup. Ct. Rules 4

Rule 52(a), Rules of Civil Procedure for District Courts 4

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

THE ISSUES AND THE EVIDENCE.

The issue between the Receiver Parkin and the Petitioner Freeman concerns only the ownership of the Marston notes, page 15 of the Petition for Certiorari. The

question involved was a question of fact. The referee in bankruptcy heard all of the evidence and the District Judge reviewed the whole record. The evidence introduced by the Receiver consisted of the testimony of four persons plus documentary evidence. The evidence introduced by Freeman consisted of Freeman's testimony alone plus 57 miscellaneous papers consisting of letters, invoices and cancelled checks which allegedly covered all of the transactions between Freeman and the Sussin Corporation. Actually only a small part of these papers were connected in any way with the Marston notes. Among the 57 papers were two unsigned and undated memoranda in Freeman's handwriting setting out certain figures claimed by Freeman to have been made by him at the time an account stated was arrived at with Russell W. Borrowdale, president of the Sussin Corporation. This account stated purported to refer to the alleged sale of the Marston notes to Freeman by Sussin. The alleged time of this account stated was some six months prior to the time Freeman filed his creditor's petition to adjudicate the Corporation bankrupt. (Tr. I, Pgs. 485, 495, 496) (Resp. Ex. 48-49, Ex. Vol. 81-82). The Referee held that Respondent's exhibits No. 48 and 49 were not in existence at the time Freeman filed his creditor's petition to adjudicate the Sussin Corporation bankrupt. (Tr. III, P. 1529). In other words they were prepared at a much later time for the purpose of manufacturing evidence for the trial. Another one of the 57 papers was an empty envelope addressed in Freeman's handwriting and postmarked July 11th, 1952 from Church Street Post Office Station, New York City. (Resp. Ex. 4, Ex. Vol. P. 37). Freeman testified the notes were mailed to him by Orco Company in the envelope. (Tr. I, P. 474). On cross examination by Freeman's attorney, Orr, president of Orco, testified his company did not mail the envelope (Tr. I, P. 109) and that he had never seen the envelope until Freeman had shown it to him at a later date

(Tr. I, P. 149). Orr testified also on cross examination, that he mailed the notes and the conditional sales contract to Sussin. (Tr. I, P. 108). The Referee found that the notes were delivered to the Sussin Corporation. (Tr. III, P. 1529). No corroborating evidence was introduced by Freeman and in his own testimony he contradicted himself so many times and testified contrary to his sworn pleadings so that no credence could be given to any of his testimony.

> "Such disregard of his oath is enough to justify the belief that the witness is capable of falsification on all matters about which he testifies." *N. & W. Co.* v. *McKenzie,* 116 Fed. (2nd) 632, page 635, and
>
> "The testimony of a witness may contain, within itself, its own impeachment, and he may be contradicted by what he states as well as by adverse testimony, and there may be so many omissions, discrepancies and improbabilities in his testimony as to justify a court or jury in disregarding it in its entirety." *Hadley* v. *White,* 367 Ill. 406, Page 412.

REASONS FOR DENYING THE WRIT.

The petitioner Freeman in his brief quoted extensively from the record in an attempt to get the judges of the Circuit Court of Appeals to review the record but he was unable to show any error that would justify a reversal of the judgment of the lower ccurt. The judges of the Circuit Court of Appeals rightly refused to disturb the order and findings of fact entered by the lower court. Freeman now appeals to this court, claiming that one of the judges in the Circuit Court of Appeals refused to read the record. The judge in his opinion said as follows, "Freeman, in substance, would have us re-weigh the evidence shown in this 1616 page record and evaluate the credibility of witnesses who appeared before the Referee. We decline to do so." This may constitute a refusal to read the record

but in the mind of this writer it constitutes a refusal on the part of the judge to "Evaluate the credibility of witnesses who appeared before the Referee." This is certainly in line with the established rule of law that in the absence of clear error, the reviewing court will refuse to set aside or reverse the findings of the trial judge or the master who had the opportunity to observe and appraise the demeanor of the witnesses while they were on the witness stand.

> Rule 52(a), Rules of Civil Procedure for District Courts, Page 476 F.C.A., Rules.
>
> *Locomotive Engineers Mutual Life & Accident Insurance Assn.* v. *Laurent* (C.C.A. 7), 172 F. (2d) 889, Page 894.

This court has stated its policy in granting review on writs of certiorari.

> "We do not grant a certiorari to review evidence and discuss specific facts." *U. S.* v. *Johnston,* 268 U.S. 220, Page 227.

Nothing shown in Freeman's petition brings this case within the purview of Supreme Court Rule 19, Section 1 (b). The decision of the Circuit Court of Appeals followed a well recognized principle of law followed by all reviewing courts; no conflict with decisions of another court of appeals has been shown; no state or territorial question is involved; and no departure from the accepted and usual course of judicial proceedings has been shown as to call for this court's power of supervision.

For the reasons above set forth the petition for certiorari should be denied.

Respectfully submitted,

RICHARD REX PARKIN, *Receiver*
by BENJAMIN F. MORRISON
Receiver's Attorney

MAR 2 2 195
HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 666

CARL E. FREEMAN,

Petitioner,

vs.

THE SUSSIN CORPORATION, a Corporation, Alleged Bankrupt, and

RICHARD REX PARKIN, Receiver,

Respondents.

PETITIONER'S REPLY TO THE BRIEFS OF RESPONDENTS.

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INDEX

PAGE

1. The Entire Record Must Be Considered by the Reviewing Court in the Application of the Clearly Erroneous Rule. 1
2. The Charges of Perjury Made by Respondents Against Petitioner Are Groundless. 5
3. The "Two-Court Rule" Has No Application to the Case at Bar. 7
4. Freeman Raised in the Trial Court the Legal Issues Presented to the Court of Appeals. 11
5. Petitioner Does Not Seek a Review of the Merits of This Case by the Supreme Court. 14

Conclusion 14

CITATIONS.

Baker v. Schofield, 243 U. S. 114, 118 9

District of Columbia v. Pace, 320 U. S. 698, 702 7

Foote Bros. Gear & Mach. Corp. v. National Labor Relations Board, 7 Cir., 114 F. 2d 611, 621 3

Goodyear Tire & Rubber Co. v. Ray-O-Vac Co., 321 U. S. 275, 278 8

Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U. S. 271, 275 ..... 7, 9

Hoeltke v. C. M. Kemp Mfg. Co., 4 Cir., 80 F. 2d 912, 926 3

In re Rosenberg, 7 Cir., 138 F. 2d 409 ..... 1, 2

McAllister v. United States, 348 U. S. 19, 20 2

PAGE

Oxley v. Sweetland, 4 Cir., 94 F. 2d 33, 41 3

Standard Accident Ins. Co. v. Simpson, 4 Cir., 64 F. 2d 583, 588 3

U. S. v. Oregon State Medical Society, 343 U. S. 326, 339 2

U. S. v. U. S. Gypsum Co., 333 U. S. 364, 395-6 ..... 2, 9

Wetzel v. Schaefer, 5 Cir., 124 F. 2d 308, 310 ..... 1, 2

STATUTES AND RULES.

Rule 7(b)(1), Rules of Civil Procedure for District Courts 12

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To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Now comes petitioner, Carl E. Freeman, and for his reply to the briefs of the respondents says:

1. *The Entire Record Must Be Considered by the Reviewing Court in the Application of the Clearly Erroneous Rule.*

Respondent Sussin, depending primarily on the decisions cited by it of the Courts of Appeals of the Fifth and Seventh Circuits, namely, *Wetzel* v. *Schaefer,* 124 F. 2d 308, 310, and *In re Rosenberg,* 138 F. 2d 409, attempts to fashion a new rule with regard to the immutability of

findings, namely, that findings of the trial court *must* be accepted by the reviewing court. (Sussin's brief pp. 12-14)

Both the *Wetzel* and *Rosenberg* cases involve findings of referees affirmed by district judges. In the *Rosenberg* case (138 F. 2d 409) the Court held, at page 409, that since the determination of the trial court was based on conflicting evidence it (the Court of Appeals) was *powerless* to change a finding as it did not weigh evidence on appeal. This statement, to the extent at least that the Court of Appeals was powerless to change a finding under the circumstances, is not a correct statement of the law (the clearly erroneous rule) as it has been interpreted by this Court. So, too, in the *Wetzel* case (124 F. 2d 308, 310) the Court's statement that findings of a referee approved by a judge will not be disturbed *unless there is no evidence upon which to base them,* does not square with the clearly erroneous rule.

On page 30 of its brief Sussin states that the Judges of the Court of Appeals in the case at bar were *bound* to affirm the District Court, and on page 35 Sussin states that it has been held time and again that the Court of Appeals, as well as this Court, will not take jurisdiction where the trial court's judgment is based on a question of fact. While the case at bar involves both fact and law, the proposition submitted by respondent is erroneous. This Court has stated repeatedly that under the clearly erroneous rule the test is whether or not the reviewing court *on the entire evidence* is left with a definite and firm conviction that a mistake has been made, and this is so although there is evidence to support the finding. *U. S.* v. *U. S. Gypsum Co.,* 333 U. S. 364, 395; *U. S.* v. *Oregon State Medical Society,* 343 U. S. 326, 339; *McAllister* v. *United States,* 348 U.S. 19, 20.

Respondent Sussin states, on pages 32 and 33 of its brief, that reviewing courts are not required to examine the entire record even though the assignment of error is that the findings are clearly erroneous. Judge Finnegan in his opinion in the case at bar gives substance to this statement of the respondent. We suppose it would be true if the appellant merely averred that the findings were erroneous, failing to specify the grounds therefor. But this was not the situation in the case at bar, as both respondents well know and as Judge Duffy has shown in his opinion. This Court, having stated in each of the cases cited above that application of the clearly erroneous rule depends upon the *entire evidence,* it seems fundamental that the whole evidentiary record must be reviewed in a case where the rule is invoked.

The Court of Appeals for the Fourth Circuit has never been reluctant to express its duty with regard to examining records before it. The Court has said repeatedly that in the class of cases wherein reviews involve facts as well as law, the review should be a real one and not perfunctory. *Oxley* v. *Sweetland,* 4 Cir., 94 F. 2d 33, 41; *Hoeltke* v. *C. M. Kemp Mfg. Co.,* 4 Cir., 80 F. 2d 912, 926; *Standard Accident Ins. Co.* v. *Simpson,* 4 Cir., 64 F. 2d 583, 588.

Judge Evans, in the Seventh Circuit, said essentially the same thing in *Foote Bros. Gear & Mach. Corp.* v. *National Labor Relations Board,* 7 Cir., 114 F. 2d 611 (reversed for other reasons in 311 U.S. 620). He said, page 621:

> "Undoubtedly the rule is well established that a finding by referee, trial court, or administrative board if supported by substantial evidence should be accepted by an appellate reviewing court. This does not relieve the appellate court, however, of the duty of examining the evidence to ascertain whether the find-

> ing is supported by evidence. And an examination of the evidence necessitates an analysis which to a certain extent is a weighing of such evidence. In fact, the court's duty to make this examination and analysis of the evidence is quite as clear (even though more burdensome and involves the tedious study of testimony and witnesses' qualifications and biases, etc.) as the construction and application of statutes or any other legal question. * * *"

While Judge Finnegan in his opinion said that Freeman had, in substance, requested the Court to re-weigh the evidence and evaluate the credibility of witnesses, this was not, at least, what petitioner prayed. Petitioner did, and rightly so, request the Court of Appeals to consider the record (not to weigh the evidence) for the purpose of determining whether clear and manifest error was committed below.

Petitioner requested the Court of Appeals to consider the testimony of Borrowdale's witnesses in the light of their interest in the case. For example, Borrowdale's brother Thomas was one witness. He had loaned his brother Russell, who was Sussin's *alter ego*, $9000. (R. 936) This witness, in substance, had $9,000 at stake in the litigation. Both Thomas Borrowdale and the witness Daniel Srnec testified for Russell Borrowdale in both trials of his suit in the state court mentioned on page 28 of the petition here. (R. 1054) They were, in substance, professional witnesses. Borrowdale's son Russell, Jr., apart from his relation to his father, was employed by Sussin. (R. 939) All witnesses for it had a business connection with the company at the time they testified, except the witness Froling and he had been in its employ for a number of years. (R. 1170)

If Judge Finnegan's opinion is permitted to stand, its impact on reviewing courts, triers of the fact, and litigants

is clear. Reviewing courts no longer may regard themselves under a duty to examine records in fact cases. Referees, masters and judges may consider their findings of fact final and themselves released from the checks and balances exercised by reviewing courts; and litigants may well abandon any thought of relief from appellate courts on questions of fact.

2. *The Charges of Perjury Made by Respondents Against Petitioner Are Groundless.*

Respondent Sussin charges that Freeman was impeached because he swore in his answer to the receiver's turn-over petition that he acquired the Marston notes through a loan to that Company and then later testified he purchased the notes from the Sussin Corporation. (Sussin brief pp. 3, 45) Reference to Freeman's answer to the turn-over petition discloses that he did not state he made a loan to the Marston Company. (R. 64)

He said in the first paragraph of his answer that he paid full legal consideration for the notes, but did not say this consideration was paid to the Marston Company. In the second paragraph he said he *agreed* to make a loan to the Marston company. This pleading discloses the uncertainty which existed in the mind of Freeman's counsel as to how to handle the situation. Freeman testified he financed the Marston camera purchase by buying its notes from the Sussin Corporation and that he included the amount he paid for the notes in his petitions for its adjudication because he found it was collecting his notes and he did not know where he stood with regard to them. (R. 759, 775, 791)

His attorney frequently stated in the record that he was proceeding on a theory of a joint liability. (R. 371, 792-3,

1358) What he overlooked was that a joint liability did not exist since the Sussin Corporation had not endorsed the notes and the only way it could be held, if at all, was by a suit to enforce its endorsement. The fact that the attorneys in the case recognized that it was a legal question and so did the Referee belies the charges made by the respondents. (R. 792) Because of a mistake in the recognition of his legal rights arising out of the transaction, Freeman is now buffeted into what the respondents mistakenly believe is an untenable position. The very least that can be said for Freeman is that he explained the matter. Borrowdale never attempted to explain his inconsistencies and falsehoods nor has respondent Sussin in its brief attempted to explain them.

Respondent Sussin charges that Freeman swore falsely when he stated in his pleadings that Sussin had less than twelve creditors. (Sussin's brief pp. 17, 39) Respondent, however, fails to advise the Court that Freeman's allegation of the existence of less than twelve creditors was not a sworn statement, *having been made on information and belief* (R. 9-10), and there is no showing in the record that he knew otherwise. It is also stated by Sussin that Freeman's attorney paid attorney Michael Gesas $1200 for causing three other creditors to intervene in the suit. (Sussin's brief pp. 3, 20) An examination of the record references cited by Sussin to support this statement show that the payment to attorney Gesas was made for services rendered by him to Freeman in the adjudication aspects of the case. (R. 1219-20) Counsel for Sussin conceded twice in statements to the Court that Mr. Gesas had represented Freeman in the proceedings. (R. 1277, 1551) Respondent Sussin, at page 31 of its brief, states that Freeman's representation to this Court that he compiled and paid for the 1616 page record is absolutely false. This Court well knows

that the appellant must pay for the printing of the record, and petitioner can produce receipted bills from his printer, aggregating almost $7,000, to evidence his payments for the printed record.

Sussin in its brief attempts to make capital of the fact that petitioner abandoned in the Court of Appeals his claim for services in the amount of $2680 rendered to Sussin. (Its brief pp. 2, 16, 39, 45) This claim was abandoned because of a failure of proof to establish how the amount of his claim was computed. The record amply shows the services were rendered. (R. 683, 893-4, 1176)

Space does not permit the refutation of all of the charges leveled at Freeman by respondent Sussin. Suffice it to say that they are not borne out by the record references, or there are no references given for many of its charges which are untrue. The brief of respondent Sussin contains so many misstatements with regard to the record that it is hard to believe they are due to inadvertence, negligence or honest error.

3. *The "Two-Court Rule" Has No Application To The Case At Bar.*

The "two-court rule" invoked by respondent Sussin Corporation (its brief p. 10) has no application to the case at bar. The rule, as this Court well knows, is based upon the proposition that two courts have made concurrent findings of fact or have at least reached the same conclusion after independent inquiries into the fact questions at issue. *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275; *District of Columbia* v. *Pace*, 320 U.S. 698, 702. As this Court pointed out in the latter case, *District of Columbia* v. *Pace*, at page 702, the rule would have no

support in reason if the second court did not make its findings as a result of its own judgment. In the case at bar the Court of Appeals made no findings and one of the judges declined to look at the record before him. Therefore, it may not be said that the Court of Appeals exercised its own judgment on the findings of fact involved. It did not re-examine the findings in the light of the evidence as this Court has indicated is necessary to the application of the rule. *Goodyear Tire & Rubber Co.* v. *Ray-O-Vac Co.*, 321 U.S. 275, 278. In the case at bar two courts did not resolve the factual issues.

The two-court rule has no application to the purely legal issues involved in the case at bar. The Referee's order of May 4, 1954, dismissing Freeman's petitions for Sussin's adjudication was based on his finding that Freeman had entered into a valid contract to purchase cameras. The Referee concluded from this that the moneys Freeman testified he loaned Sussin to manufacture six cameras were not loans at all but advance payments on the purchase of cameras. (R. 1537) The validity of this contract, that is whether it had any binding force or effect on account of the complete failure of a meeting of the minds of the parties, posed a pure and substantial legal question. The legal propriety of the Referee's order of May 21, 1954, handing over to the Borrowdale Brothers on their second reclamation petition the trucks and property in the possession of the receiver, without the introduction of a scintilla of evidence, was a pure and substantial legal question. The Referee's order of June 21, 1954, dismissing the intervening creditors on their motions without costs and over the objections of Freeman, particularly under the circumstances of their having been paid fifty per cent. of their claims by Sussin, who paid no other creditors, posed a pure question of law, *i.e.*, whether or not the Referee's action was an abuse of

his judicial powers. It is fundamental that these legal issues may not be resolved by the two-court rule.

Respondent Sussin's reliance on the two-court rule in an attempt to defeat petitioner's application for certiorari avoids the proposition of general importance raised by petitioner, namely, whether or not the refusal of one of the judges of the Court of Appeals to examine the record deprived petitioner of his statutory right of appeal, where it was contended that findings were clearly erroneous.

The two-court rule has no application where it is clear, as it is in the case at bar, that the findings are erroneous (*Baker* v. *Schofield,* 243 U.S. 114, 118) or, stating it another way, where the error is obvious or exceptional. (*Graver Tank & Mfg. Co.* v. *Linde Air Products Co.,* 336 U.S. 271, 275). In the case at bar, for example, little, if any, credit may be given the testimony of Borrowdale and his five witnesses that Freeman purchased six cameras and agreed to a "down payment" of $20,000 for the reason that this testimony is in direct conflict with the contemporaneous documents. *United States* v. *United States Gypsum Company,* 333 U.S. 364, 396. The contract prepared by Borrowdale's attorney pursuant to Borrowdale's instructions, which instrument, according to Borrowdale, purported to embody the agreement of the parties, was not a contract for the purchase of any specific number of cameras (a purchase was to be evidenced by separate *written* order) nor did it obligate the vendee to make a down payment of any specific amount. (Sussin's Ex. 11, Ex. Vol. p. 108; R. 611). It was this contract that Borrowdale attempted to induce Freeman to sign from March to December, 1952, according to the testimony of Borrowdale, Jr. (R. 980-1).

Nor does the testimony of Borrowdale and his witnesses that Freeman, through the Sussin *Sales* Company, purchased six cameras from respondent Sussin and agreed to pay $20,000 as a "down payment" square with the articles of incorporation prepared by Borrowdale's attorney for the Sussin *Sales* Company, which company, if it was one, was actually Freeman. (Sussin brief p. 37) These articles of incorporation, never executed, disclosed that the capital to be invested in the Sussin *Sales* Company was $1,000, not $20,000, and that during the first year of its existence the property it would own would amount in value to $5,000, not $20,000 or x-times $20,000. (Borrowdale's Ex. 9, Ex. Vol. pp. 128, 129; R. 611)

As to the controversy between Freeman and the receiver over the ownership of the Marston promissory notes, a crucial issue was whether Freeman or the Sussin Corporation received the notes in the mail from the Marston Company. Borrowdale's testimony that they were received by him was palpably false. (See Freeman's petition pp. 24-25) Freeman introduced into evidence the envelope in which the notes were received by him through the mail from New York. (Freeman's Ex. 4, Ex. Vol. p. 37; R. 506-7) Freeman, unless he possessed supernatural power, could not have anticipated in July, 1952, when these events took place, the subsequent need for this exhibit and therefore, in addition, make arrangements in some way, inconceivable to us, to have an envelope addressed to himself mailed in New York from the subpostal station used by the Marston Company on the actual date Anthony, its bookkeeper, mailed the notes. The receiver in his brief (p. 3) relies on the testimony of Mr. Orr, who owned the Marston Company, that he mailed the notes to the Sussin Company. His testimony is of no significance, however, in the light of Mr. Orr's admission on cross examination that Anthony did the mailing. (R.

109, 177) Anthony even signed the letter of transmittal (Freeman's Ex, 2, Ex. Vol. p. 34; R. 506-7).

The clear and obvious error in the finding of the Referee that Freeman agreed to purchase cameras is disclosed by the documents mentioned in the second and third paragraphs above, but they must be examined, as must the record references and exhibits on the issue of the receipt of the Marston notes, to give conviction to the existence of the error assigned.

4. *Freeman Raised in the Trial Court the Legal Issues Presented to the Court of Appeals.*

Respondent Sussin urges in its brief (pp. 2, 8, 37) that petitioner Freeman did not raise in the trial court the questions of law to which the Court of Appeals extended the clearly erroneous rule. On this the respondent is mistaken. With regard to the crucial question of whether a valid and binding contract for the purchase of cameras was shown by Sussin, petitioner, at the very commencement of the proceedings, in his reply filed in the trial court on March 19, 1953, denied the existence of a contract for the purchase of cameras. In this pleading he denied the allegations of paragraph 4 of Sussin's answer to the petitions for adjudication in which paragraph of its answer the alleged contract was pleaded. (R. 16, 12) Freeman in his petition filed June 11, 1954, for the review of the Referee's order of May 4, 1954, which order dismissed his petitions for adjudication on the ground that the Sussin Corporation was not indebted to him, raised the point that the findings in the Referee's said order were erroneous *and without basis in law.* (R. 1486) On June 11, 1954, at the time of the filing of the said petition for review, the Referee had not as yet made a finding nor come to a legal

conclusion with regard to the existence of a contract for the purchase of cameras. (R. 1421-2)

The Referee's order of May 4, 1954, had been entered on the written motion of the respondent Sussin which contravened Federal Rule 7(b)(1) for failure to state the grounds or reasons for the relief it requested, which was the dismissal of Freeman's petitions for its adjudication. (R. 1394) The Referee for the first time announced his findings and conclusions that a contract for the purchase of cameras existed between Freeman and Sussin and that Freeman's money paid to or for its benefit was on account of this contract when he filed on July 20, 1954, his certificates on the review of his orders of May 3 and May 4, 1954. (R. 1528, 1537) The filing of these certificates was roughly a month and one-half after Freeman was required to file his petitions for review of these very orders. (R. 1430) It is apparent that Freeman, by taking exception in his petitions for review to all the Referee's conclusions of law under a broad assignment of error, did all he could to preserve his rights in anticipation of what might be forthcoming in the Referee's certificates thereafter to be filed.

Petitioner's counsel argued before the District Judge on the hearing of his petitions for review the question of the legal force and effect of the alleged contract for the purchase of cameras. The only argument of the four counsel who appeared and argued before the District Judge on that occasion, which argument was printed as part of the record on appeal, was that of counsel for Sussin who had made several substantial admissions during the course thereof. One was that a determination of the validity of Freeman's claim could be the difference, depending upon its allowance or disallowance, between the solvency or insolvency of Sussin. (R. 1551) This admission completely refuted a preposterous contention previously advanced

by Sussin (and asserted also in its brief here, pp. 21-22) that the company had a substantial net worth.

Since respondent Sussin challenges the assurance petitioner's counsel gave to this Court that he raised and argued before the District Court the question of the existence of a contract to purchase cameras, both in fact and in law, petitioner, if certiorari is granted or depends thereon, will supplement the already prolix record by printing the argument made in the trial court. However, petitioner's assurance that he raised these points in the trial court is corroborated to some degree by the statements made by counsel for Sussin in his argument before the District Judge. (See R. 1550, 1555, 1559)

Respondent Sussin's failure to make a frontal attack on the issue of whether or not the contract for the purchase of cameras, if there was one, had any legal force or effect is a concession of the merit of petitioner's argument. It is manifestly clear to one examining this record that such a contract could not possibly have existed for the reason that Borrowdale's mind had not met itself on any one of the essentials of the contract. On the element of price alone Sussin, in its brief, flails around repeating the statement that Freeman purchased six cameras and agreed to a "down payment" thereon of $20,000, but not once does Sussin mention the balance of the purchase price to be paid for the cameras, or the contract price, except that on the last page of its brief it indicates that the price of the six cameras was the same as the down payment, *i.e.*, $20,000. In the Court of Appeals Sussin argued that the purchase price of the six cameras was $24,000.

Freeman's petitions for review of the Referee's orders of May 21 and June 21, 1954, the first of which gave the Borrowdale Brothers the property they claimed without its being required to make any showing of ownership, and the latter dismissing the intervening petitioning creditors

from the suit, clearly show the raising in the trial court of the legal questions concerning their validity. (R. 1475-7, 1503-6)

5. *Petitioner Does Not Seek a Review of the Merits of This Case by the Supreme Court.*

It is true that petitioner has made a comprehensive statement of the complex facts in this application for certiorari and, in addition, has posed the merits of the case as one of the questions presented. (Question No. 4, p. 3 of Petition for Certiorari) The latter action was one of pure legal caution. The extensive discussion of the facts, however, was primarily to show the Court the palpably false and evasive testimony of the president of the respondent Sussin Corporation, and that the ultimate issues in the case are not reducible to one of credibility, as Judge Finnegan seemed to believe. A conviction that the Courts below have fallen victim to the calumny of the Sussin Corporation's president, will never become settled unless the facts are clearly understood. Accordingly, petitioner appeals to this Court to grant his application for certiorari to the end that the judgment of the Court of Appeals be reversed and the cause remanded for a real review, not a mere perfunctory one.

CONCLUSION.

Petitioner respectfully repeats the prayer of his petition for certiorari.

Respectfully submitted,

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